United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,757

NATHANIEL CLIFTON, 6 4 2
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from a Final Order
of the United States District Court
for the District of Columbia

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888 Seventeenth Street, N.W.
Washington, D.C. 20006

March 7, 1966

STATEMENT OF QUESTIONS PRESENTED

1. Whether the voluntariness of appellant's confession, the sole evidence of his guilt of a charge of robbery, was reliably determined within the meaning of Jackson v. Denno, 378 U.S. 368 (1964), where the district court, although holding a preliminary hearing out of the presence of the jury, (a) failed to make any specific findings on the underlying issues of coercion and duress, (b) did not instruct the jury that before it could convict appellant it should find his confession to be voluntary beyond a reasonable doubt since it was the only evidence in the case of his guilt, and (c) gave the jury a virtually peremptory instruction that the confession was to be found voluntary and not the product of physical coercion as appellant claimed; and, if the principles of Jackson v. Denno were not followed, whether the rationale of that case should be applied retrospectively in the present collateral proceeding.

2. Whether appellant's alleged confession to a charge of robbery, extracted from him by police interrogators during a five-day period of delay between his arrest on February 28, 1946, and his presentment to a magistrate for commitment on March 5, 1946, should have been excluded under McNabb v. United States, 318 U.S. 332 (1943).

3. Whether the decision in Escobedo v. State of Illinois, 378 U.S. 478 (1964), vitiates appellant's conviction, based solely on an uncounseled confession obtained during a five-day period of detention in police custody, where the police interrogators admittedly failed to inform appellant at any time of his constitutional right to remain silent and of the right to procure counsel; and, if appellant's conviction would otherwise be void under Escobedo, whether the principle of that case should be applied retrospectively in the present collateral proceeding.

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JURISDICTIONAL STATEMENT

This is an appeal from a final order of the district court entered on March 16, 1965, denying appellant's petition for a writ of error coram nobis, seeking to set aside and vacate a judgment of conviction entered on a charge of robbery

by the same district court on April 18, 1946.[1] Following the district court's denial on March 30, 1965, of appellant's pro se application for leave to proceed in forma pauperis, this Court on October 26, 1965, granted a timely petition for leave to prosecute an appeal without prepayment of costs. Jurisdiction to decide the appeal is vested in this Court by virtue of Sections 1291 and 1294 of Title 28 of the United States Judicial Code (28 U.S.C. 1291, 1294). See also 28 U.S.C. 2255; United States v. Morgan, 346 U.S. 502 (1954).

STATEMENT OF THE CASE

1. Preliminary Statement Concerning the Record.

Appellant was tried and convicted in April of 1946. Since no appeal was taken,[2] no transcript of appellant's

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[1] Having long since served his sentence to a term of imprisonment of from two to six years on the 1946 conviction, appellant is presently incarcerated as a third felony offender under the New York State recidivist statute (New York Penal Law, Chapter 40, Section 1941). Accordingly, he is not technically "[a] prisoner in custody under sentence of a court established by Act of Congress..." within the meaning of Section 2255 of Title 28 of the United States Code (28 U.S.C. 2255) and, therefore, a motion to vacate an unlawful sentence pursuant to Section 2255 does not lie. The Supreme Court has held in virtually identical circumstances, however, that the proper remedy is in the nature of the common law writ of error coram nobis which has not been superseded by the enactment of Section 2255. See United States v. Morgan, 346 U.S. 502 (1954).

[2] Court-appointed trial counsel has informed present counsel that he did not discuss the possibility of appealing the 1946 judgment of conviction with the appellant. It does not appear that appellant was otherwise aware of his right to appeal.

trial on April 4 and 5, 1946, was prepared. On November 6, 1950, appellant filed a pro se motion seeking to obtain a copy of the transcript at the expense of the government. This motion was denied by the district court "because there is no sufficient showing why the Government should be put to this expense" (Memorandum, November 6, 1950). Again, on April 30, 1964, appellant requested a copy of the transcript, but this request was also denied on the basis that no proper showing of the purpose for which the record was desired had been made.

Following the district court's dismissal of the present petition for a writ of error coram nobis and its denial of appellant's request for leave to proceed in forma pauperis, this Court on June 17, 1965, entered an order directing preparation of the reporter's transcript of the proceedings held on April 4 and 5, 1946, concerning the voluntariness of appellant's confession. Such a transcript, however, could not be prepared since a search by district court personnel failed to produce the original notes of the court reporter who transcribed the hearing referred to.[3/]

In its opinion dismissing the petition for a writ of error, the district court stated (United States v. Clifton, 239 F. Supp. at 51 (D.C. D.C. 1965)):

[3/] Following his appointment by this Court on October 26, 1965, present counsel and district court personnel conducted a further extensive search in an effort to locate the notes of the 1946 proceedings. This unsuccessful effort indicated that the notes have either been lost or misplaced. In any event, they cannot be located.

> This Court maintains detailed contemporary, handwirtten trial notes in permanent bound volumes. It has consulted its trial notes concerning this case.

Since the district court "consulted its trial notes" and disposed of the petition for a writ of error at least partly on the basis thereof, both parties to the present appeal deemed it appropriate that a copy of these notes be included in the record on appeal in this case.[4/] A true copy of the "contemporary, handwritten trial notes" referred to by the district court has been lodged with this Court and will be cited herein as "Trial Notes, p. ___."[5/] Thus, the record on appeal consists of (1) the regular docket entries and papers, (2) the district court's trial notes concerning this case, and (3) a certified copy of the district court's charge to the jury on April 5, 1946, a copy of which as originally filed in the case has been found and forwarded to this Court as a supplemental record on appeal.

4/ As Judge Leventhal pointed out in his dissent from the order granting the petition for leave to prosecute an appeal without prepayment of costs: "No reporter's transcript can be provided" (Order, October 26, 1965; No. M-2577, p. 2). He also stated (ibid.): "Where a transcript is unavailable a judge's notes should suffice as the court's record of the trial...."

5/ The trial notes involved appear at Volume II, pages 42-46, inclusive, of the district court's permanent bound volumes of trial notes.

2. Appellant's Arrest, Confession, and Conviction in 1946.

On February 20, 1946, the complaining witness was attacked by three men who took his wallet containing two dollars and then fled away up an alley (Trial Notes, p. 42; Indictment, dated March 7, 1946, p. 1). On Thursday, February 28, 1946, appellant and one James Moore, Jr., ultimately indicted as a co-defendant, were arrested in connection with this robbery, and on the following day, March 1, 1946, the third defendant, John D. Hines, was arrested (Trial Notes, p. 43).

Appellant was first taken to the Thirteenth Precinct for questioning by local officers and was interrogated for an unknown period of time during the day of March 1, 1946 (id., at p. 44).6/ Also, on March 1, 1946, the defendants were taken to a line-up at police headquarters, but the complaining witness was unable to identify either of them as one of his assailants (id., pp. 42, 43, 44; Instructions, p. 5).

On Saturday, March 2, 1946, some two days after his arrest, appellant was taken to headquarters for further questioning by detectives attached to the Robbery Squad (Trial Notes, pp. 42, 43, 44). At some point during these interrogations at headquarters on March 2, 1946, appellant allegedly made certain incriminating statements concerning

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6/ The record does not reveal whether, or for what period of time, appellant may have been questioned on February 28, 1946, the day of his arrest.

the crime and also implicated Moore and Hines (id., at p. 43). At this point, Moore was brought into the squad room, appellant repeated his statements, and thereupon Moore acknowledged his involvement in the robbery (id., pp. 42, 43). Hines, the third defendant, was then confronted with the statements of appellant and Moore, but, while admitting that "he knew the other two boys" (id., at p. 43), Hines denied any previous knowledge of, or connection with, the robbery (ibid.).

No further interrogation of appellant occurred until the following Monday, March 4, 1946, when he was again questioned by a detective assigned to the Robbery Squad (id., at p. 42). At no time during these various sessions of interrogation was appellant advised of his constitutional right to remain silent or of his right to procure counsel (id., at p. 43). Neither does it appear that he was cautioned that any statement he might make could be used against him.

On Tuesday, March 5, 1946, five days after his arrest on Thursday, February 28, 1946, appellant was finally brought before a magistrate for commitment (Form 17, Case No. 44993, United States v. Nathaniel Clifton, et al., on file at the Court of General Sessions, Criminal Division). Appellant "waived" a preliminary hearing and was held to await the action of the grand jury (ibid.; see also Warrant, dated March 6, 1946). In default of recognizance in the amount of $2,000, appellant was committed to jail (Warrant, supra).

The indictment was returned on March 7, 1946, and was filed in open court on March 18, 1946 (Indictment, supra). Without benefit of counsel, appellant pleaded not guilty and was returned to jail to await trial. Following the appointment of counsel on March 27, 1946, the trial of the three defendants began in the district court before the Honorable Alexander Holtzoff, District Judge, and a jury on April 4, 1946.

At the trial, the only evidence of appellant's guilt presented by the government was the testimony of the interrogating police officers concerning appellant's alleged incriminating statements obtained on March 2 and 4, 1946.[2/] Upon objection that appellant's inculpatory statements were the result of physical coercion and therefore inadmissible, the district court excluded the jury and conducted a preliminary hearing concerning the voluntariness of the alleged confession (Trial Notes, p. 42).

Appellant took the stand and testified that he was beaten by two or three detectives at the Thirteenth Precinct on March 1, 1946, following his arrest on February 28, 1946 (ibid.). In support of his contention that he had been beaten during the course of police interrogation, appellant

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2/ The complaining witness, while testifying as to the details of the alleged robbery, was unable to identify any of the defendants as his assailants (Trial Notes, p. 42).

identified a shirt which he said he wore on March 1, 1946, during one of the sessions of police questioning (ibid.). The shirt "was torn, badly torn, and...spattered with blood..." (Instructions, pp. 7-8; see also Trial Notes, p. 42). Appellant testified further that the statements he purportedly made on March 2, 1946, implicating himself in the robbery were the result of his fear that if he did not confess he would be beaten again (Trial Notes, p. 42). The defendant Moore also testified that he had been beaten in the stomach at the Second Precinct, but not by members of the Robbery Squad during the interrogation at police headquarters (id., at p. 43). In rebuttal, Edward P. Hallman, a detective sergeant attached to the Robbery Squad at headquarters and the government's principal witness, testified that the appellant was not threatened or beaten and was given no promises of any kind as an inducement to confess to the charged crime of robbery (id., p. 42). Virtually identical testimony was given by three other police officers who participated in the interrogation of the defendants either at the Thirteenth or Second Precincts or at headquarters (id., at p. 44). Appellant's objection to the admissibility of his alleged confession was summarily overruled (ibid.).

The jury was brought back and the trial resumed, with the various police officers who had participated in the interrogation of appellant testifying to the effect that

appellant and Moore had admitted participating in the crime and denying that either was mistreated in any way. Following their testimony that the co-defendant Hines persisted in his denial of involvement in the crime, the district court directed a judgment of acquittal as to that defendant (id., at p. 43).

Appellant took the stand in his own defense. He testified that he was questioned at the Thirteenth Precinct during the night of March 1, 1946, that police officers started beating him, and that he later admitted everything they asked him (id., at p. 43a). He identified the shirt he wore when he was arrested on February 28 and on March 1 during the first sessions of questioning (ibid.). As during the preliminary hearing in the absence of the jury, appellant maintained that the blood stains on the shirt were the result of injuries sustained during the beating at the hands of police officers at the Thirteenth Precinct (ibid.). Again, the police officers denied any mistreatment of appellant.

During the charge to the jury, the court stressed that the primary issue as far as the appellant was concerned was whether he, an admitted felon,[8/] or the police officers were

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8/ Appellant had previously pleaded guilty to a charge of grand larceny and was given a suspended sentence of one to three years on January 30, 1946. See Criminal Case No. 76105, United States District Court for the District of Columbia.

to be believed with respect to appellant's contention that his confession was obtained as a result of physical coercion (Instructions, pp. 4-7). The court stated (id., at pp. 7-8):

> The defendants claim that the confessions were false and were obtained as a result of severe beating. If this assertion is true the officers were guilty of very grave and severe misconduct, and of an illegal act. The officers deny, however, that they beat the defendants, or that they ill-treated them in any way....
>
> It is for you members of the jury to decide whom to believe on this vital issue -- the officers or the defendants.
>
> * * *
>
> If it be true that defendants Clifton and Moore were beaten into a confession, why didn't the same thing happen to the defendant Hines and why wasn't a confession obtained from him in the same reprehensible manner? And yet the officers testified that they questioned Hines but Hines did not confess and did not admit the commission of the offense.

Early in the charge, the court gave the usual "reasonable doubt" instruction (Instructions, pp. 3-4) to the effect that "'proof beyond reasonable doubt' really means that it must be such proof as will result in an abiding conviction of the defendants' guilt on your part such as you would be willing to act upon in the more weighty and important matters relating to your own affairs." The court did not instruct the jury, however, that before it could convict the appellant it must find beyond a reasonable doubt that his confession,

which was the only evidence in the case of his guilt, had been voluntarily given.

The jury retired at 11:15 a.m. on April 5, 1946 (Trial Notes, p. 45). At 3:55 in the afternoon, more than four and one half hours later, the jury apparently reported that it was deadlocked and could not reach a verdict. In any event, the district court recalled the jury and gave the so-called "Allen" instruction to the effect that if a majority of the jury was for a verdict of acquittal or a verdict of guilty then the minority should fall in line and permit a unanimous verdict by going along with the majority one way or the other (id., at p. 46). Thereafter, at 4:50 in the afternoon, the jury returned with a verdict of guilty as charged (ibid.).

On April 18, 1946, judgment was entered on the verdict and the appellant was sentenced to a term of imprisonment of two to six years, to run concurrently with his previous sentence of one to three years in Criminal Case No. 76105. No appeal was taken.

3. The Present Collateral Attack on the 1946 Judgment.

On February 17, 1965, appellant filed a pro se petition for a writ of error coram nobis, seeking to vacate and set aside the April 18, 1946 judgment of conviction.[9/] Appellant

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9/ On two previous occasions, in 1950 and 1964, appellant had unsuccessfully sought to obtain a copy of the papers and transcript of the proceedings in his case.

specifically challenged as in conflict with the decision in Jackson v. Denno, 378 U.S. 368, the procedures utilized by the district court in determining the voluntariness of his alleged confession in 1946 to the crime of robbery.

On March 16, 1965, the district court filed its Memorandum Opinion and Order denying the petition for a writ of error. See United States v. Clifton, 239 F.Supp. 49 (D.C. D.C. 1965). The denial was based on two grounds. First, the district court stated that the rule of the Jackson case should not be applied retroactively, stating (id., at p. 50-51):

> It is inconceivable that the Supreme Court could have intended that its decision in the Jackson case should have a retroactive effect to the extent of permitting a reopening of all old cases....This Court adopts the view that the rule of the Supreme Court in the Jackson case must be deemed to operate only in futuro....

Second, the court ruled that, in any event, after consulting its contemporary, handwritten trial notes concerning the case, it appeared that the court, by conducting a hearing out of the presence of the jury and then submitting the issue of voluntariness to it as a question of fact, had actually followed procedures for the determination of the voluntariness of a confession fully in accord with the decision of the Supreme Court in the Jackson case. The court stated (id., at p. 51): "It may be observed that the practice followed by this Court in this instance is that traditionally and generally adopted by Federal Judges in this district." Accordingly, the petition was dismissed.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

Relevant portions of the Fifth and Sixth Amendments to the Constitution of the United States and Rule 5(a) of the Federal Rules of Criminal Procedure are set forth in the Appendix to this brief.

STATEMENT OF POINTS

1. When the voluntariness of a confession is challenged, the decision in Jackson v. Denno, 378 U.S. 368 (1964), requires that the trial judge, in addition to holding a preliminary hearing out of the presence of the jury, make a specific finding that the confession was voluntary beyond a reasonable doubt. United States v. Inman, 352 F.2d 954 (4th Cir. 1965); Stevenson v. Boles, 331 F.2d 939 (4th Cir. 1964), aff'd per curiam, 379 U.S. 43 (1964). The district court in the present case did not make such a finding.

2. The district court erred in failing to instruct the jury, whether specifically requested to do so or not, that before it could convict appellant it should find his confession to have been voluntary beyond any reasonable doubt. Stevenson v. Boles, supra. To the contrary, the court in effect charged the jury that appellant's confession was voluntary and was not the product of physical coercion as appellant claimed.

3. The Supreme Court has made it clear that the due process requirements enunciated in Jackson v. Denno are to be applied retrospectively in collateral attacks on otherwise final judgments of conviction. Lower courts, both federal and state, have uniformly applied the rule of Jackson v. Denno retroactively.

4. Appellant's confession, obtained at least on the third, and possibly as late as the fifth day of a period of unnecessary police delay in bringing appellant before a committing magistrate, should have been excluded under McNabb v. United States, 318 U.S. 332 (1943), and Rule 5(a) of the Federal Rules of Criminal Procedure. A judgment of acquittal should have been directed since the only evidence of appellant's guilt was his inadmissible confession.

5. At least by the time of appellant's confession on the third day of his detention, if not before, the police procedure had shifted from the "investigatory" to the "accusatory" within the meaning of Escobedo v. State of Illinois, 378 U.S. 478 (1964), and the admitted failure of the police interrogators to inform appellant of his absolute constitutional rights to remain silent and to procure counsel nullifies his conviction based solely on an uncounseled confession.

6. Since the rule of the Escobedo case involves "the fairness of the trial--the very integrity of the fact finding process" (Linkletter v. Walker, 381 U.S. 618, at 637 (1965)),

the exclusionary rule established by that case that uncounseled confessions are inadmissible without regard to questions of unnecessary delay or voluntariness is to be applied retrospectively in collateral proceedings.

SUMMARY OF ARGUMENT

1. On the proffer by the government of appellant's confession, an objection was interposed to its admissibility on the ground that it was not the product of appellant's free will, but resulted from severe beatings administered to the appellant by interrogating police officers on the third day following his arrest on a charge of robbery. Excluding the jury from the room, the trial court conducted a preliminary hearing with respect to the voluntariness of the confession, at which both the interrogating officers and the appellant took the stand to give their contradictory versions of what happened during the interrogating sessions. The objection to the admission of the confession was summarily overruled, the jury was recalled, and virtually the same testimony was repeated in open court.

Contrary to the principles of the decision in Jackson v. Denno, 378 U.S. 368 (1964), the district court made no findings, specific or otherwise, that, on the basis of the preliminary hearing, he had determined that the confession was voluntary beyond a reasonable doubt. See Stevenson v. Boles, 331 F.2d 939 (4th Cir. 1964), affirmed per curiam,

379 U.S. 43 (1964); United States v. Inman, 352 F.2d 954 (4th Cir. 1965). In submitting the issue of voluntariness to the jury, the district court failed explicitly to instruct that unless the jury were satisfied beyond a reasonable doubt that appellant's confession, the only evidence in the case of his guilt, was voluntary, they should return a verdict of not guilty (ibid.). Such an instruction must be given whether requested or not. Indeed, the charge to the district court on this vital point amounted virtually to a peremptory instruction that the confession was voluntary and that the appellant, a convicted felon, was not to be believed in his assertions that his inculpatory statements resulted from his fear that he would be beaten again if he did not confess to the crime with which he was charged.

These procedures did not satisfy the plain constitutional requirement that the issue of voluntariness be reliably determined so that convictions will not be based in whole or in part on involuntary confessions. In fact, in the circumstances of the present case it clearly is impossible to say that appellant's confession was voluntary beyond a reasonable doubt, and the district court should have directed a judgment of acquittal as to the appellant.

2. An eighteen year old uncounseled and untutored indigent with limited abilities, appellant was arrested on February 28, 1946, and was questioned at various police precincts, as well as at police headquarters, on an unknown

number of occasions and for unknown periods of time. Finally, on the third day of this period of detention, the sole purpose of which was an attempt to extract incriminating statements from appellant, and possibly as late as the fifth day of this period of unnecessary delay, appellant confessed to the crime of robbery with which he had been charged. He was detained in police custody for a total period of five days between his arrest on February 28, 1946, and his ultimate presentment to the magistrate for commitment on March 5, 1946. The delay clearly was utilized to obtain a confession by secret police interrogation. The confession was not "spontaneous," but was the product of a process of interrogations lending itself, if not specifically designed, to elicit incriminating statements. The confession should have been excluded under Rule 5(a) and the rationale of McNabb v. United States, 318 U.S. 332 (1943). See also Spriggs v. United States, 118 U.S.App.D.C. 248, at 251, 335 F.2d 283, at 286 (1964).

3. It is undisputed that at no time during appellant's five-day period of unnecessary delay before being presented to a magistrate was he informed by his police interrogators of his absolute constitutional right to remain silent and of the right to procure counsel. Since by the time of his confession on the third day of custody the "focus" clearly had shifted to the appellant as a prime suspect in connection with the crime for which he was arrested, the ruling in

Escobedo v. State of Illinois, 378 U.S. 478 (1964), requires that a conviction based solely on such a confession be vacated and set aside.

Nor can there be any serious dispute as to whether Escobedo should be applied retroactively in a collateral proceeding such as the present one. The doctrine of that case, i.e., confessions obtained in violation of an accused person's right to counsel under the Sixth Amendment and his absolute right to remain silent under the Fifth Amendment, are to be excluded from evidence regardless of the issue of voluntariness, plainly relates directly "to the fairness of the trial--the very integrity of the fact-finding process" and thereby meets the standard for retroactive operation established by the Supreme Court in Linkletter v. Walker, 381 U.S. 618, at 639 (1965). Lower court decisions, both state and federal, have almost uniformly applied the rule of Escobedo retrospectively. See, e.g., United States ex rel. Russo v. State of New Jersey, 351 F.2d 429 (3rd Cir. 1965).

The only possible distinction between the present case and the situation in Escobedo is the fact that here appellant had not previously retained counsel and made no specific request to obtain legal representation. The great weight of authority attaches no significance to such a distinction, and most courts in similar circumstances have noted that an accused person not requesting legal aid probably has more

need of assistance than one like Danny Escobedo who makes a specific request. See Lee v. United States, 322 F.2d 770 (5th Cir. 1963); United States ex rel. Russo v. State of New Jersey, supra; Cephus v. United States, ___U.S.App.D.C.___, 352 F.2d 663 (1965) (dissenting opinion); Harrison v. United States, ___U.S.App.D.C.___, ___ F.2d ___ (en banc opinion released December 7, 1965).

ARGUMENT

Introduction

This is still another in the continuing catalog of "low visibility" cases where the only real trial of a person charged with crime occurs in the back room of the police station.[10/] This case presents a number of substantial and closely related questions under Jackson v. Denno, McNabb, and Escobedo concerning the reliability of the guilt determing process and the necessary procedures for protecting the fundamental rights of an accused person in a situation where the only evidence of guilt is an uncounseled confession obtained "in the coercive milieu of secret police interrogation"

10/ See J. Goldstein, Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice, 69 Yale L. J. 543 (1960); Note, An Historical Argument for the Right to Counsel During Police Interrogation, 73 Yale L. J. 1000 (1964); Sutherland, Crime and Confession, 79 Harv. L. Rev. 21 (1965).

Alston v. United States, ___U.S.App.D.C.___, 348 F.2d 72, at 73 (1965).11/

While the present proceeding comes almost twenty years after appellant's conviction in 1946, the vital questions raised are by no means moot. Thus, appellant is presently serving a term of imprisonment of from ten to fifteen years in a New York state prison as a third felony offender. If the 1946 conviction in the district court is set aside, appellant would be entitled as a matter of law to be resentenced by the New York court as only a second felony offender. This could result in a reduction by almost one-half of his present sentence.

Moreover, if the 1946 judgment is not set aside and appellant is subsequently convicted in New York of a felony, he would receive a mandatory sentence of life imprisonment as an habitual criminal. See New York Penal Law, Chapter 40, Section 1941; United States v. Morgan, 342 U.S. 502 (1954). This brief will demonstrate that appellant's arrest, detention, trial and conviction were fraught with "error of constitutional proportions" (Hutcherson v. United States, ___U.S.App.D.C.___,

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11/ For recognition of the interlacing nature of these rules, all designed to guard against the use of involuntary confessions, see Ricks v. United States, 118 U.S.App.D.C. 216, 334 F.2d 964 (1964).

351 F.2d 748, 753 (1965)), and that the only appropriate remedy is reversal with directions to vacate and set aside appellant's unlawful 1946 conviction.

I. THE VOLUNTARINESS OF APPELLANT'S CONFESSION WAS NOT RELIABLY DETERMINED WITHIN THE MEANING OF JACKSON v. DENNO, THE DUE PROCESS REQUIREMENTS OF WHICH ARE TO BE APPLIED RETROSPECTIVELY IN COLLATERAL PROCEEDINGS.

[With respect to Point I, appellant desires the Court to read the district court's Trial Notes, pp. 42-46, and its Charge to the Jury, pp. 1-8.]

A. The Due Process Requirements of Jackson v. Denno.

In the landmark case of Jackson v. Denno, 378 U.S. 368 (1964) the Supreme Court held violative of the due process requirements of the Fourteenth Amendment[12/] the New York procedure for determining the voluntariness of confessions in criminal cases. Under the New York procedure, the trial court heard evidence on the issue of voluntariness and excluded a confession only "if a verdict that it was freely made would be against the weight of the evidence" (People v. Leyra, 302 N.Y. 353, at 362, 98 N.E.2d 553, at 558 (1951)).

12/ "It is of course immaterial that in the present case the Due Process Clause of the Fifth instead of the Fourteenth Amendment is applicable" (Hutcherson v. United States, ___ U.S.App.D.C. ___, 351 F.2d 748, at 753 (1965)).

If there was a fair question of fact as to which reasonable men could differ, the trial court was to admit the confession into evidence, later instructing the jury to decide the issue of voluntariness itself and to disregard the confession if believed to be involuntary. See, e.g., People v. Doran, 246 N.Y. 409, at 416, 159 N.E. 379, at 381 (1927).[13]

The Supreme Court held that the New York procedure could not meet the due process requirements that the question of voluntariness be reliably determined and that criminal convictions not be based on involuntary confessions. The Court emphasized the danger that some members of the jury without reaching a separate conclusion with respect to the issue of voluntariness might return "an unanalytical and impressionistic verdict based on all they heard" (id., at 380, quoting from Stein v. New York, 346 U.S. 156, 177-78 (1953), which was overruled in Jackson).[14] Even should the jury find the

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[13] The Court also referred to the so-called "orthodox" procedure pursuant to which the trial court alone decides the voluntariness of a confession, and to the so-called "Massachusetts" rule, whereby the trial court makes a preliminary determination and admits the confession into evidence if he finds it voluntary, with instructions that the jury must also find the confession voluntary before considering it. While the Court stated that "[w]e raise no question here concerning the Massachusetts procedure" (378 U.S., supra, at 378, n. 8), in what is clearly dictum the court apparently approved the Massachusetts rule, stating, inter alia, "[g]iven the integrity of the preliminary proceedings before the judge, the Massachusetts procedure does not, in our opinion, pose hazards to the rights of the defendant" (ibid.).

[14] "Under the New York procedure, the evidence given the jury inevitably injects irrelevant and impermissible considerations of truthfulness of the confession into the assessment of voluntariness" (id., at 386).

confession involuntary, it may have been influenced by irrelevant evidence of its truthfulness.

Moreover, even if the jury found the confession involuntary, it may still have been unable to ignore it if there was other persuasive "reliable" evidence of the defendant's guilt. In short, the only way to assure against the use of involuntary confessions, which expanded concepts of fairness in the process of determining guilt demand, is to require the trial judge in the first instance reliably to determine the voluntariness of the confession. "If the court concludes that the confession is voluntary it is admitted in evidence; but the jury is not bound by this ruling of the court on voluntariness. Under appropriate instructions it may decide that the confession was involuntary, in which event the jury must disregard it" (Hutcherson v. United States, ___ U.S.App.D.C. ___, 351 F.2d 748, at 754 (1965) (emphasis added)). See also Curtis v. United States, ___ U.S.App.D.C. ___, 349 F.2d 718 (1965); Green v. United States, ___ U.S.App.D.C. ___, 351 F.2d 198 (1965).

Thus, it is clear that the trial court in the first instance must reliably determine the issue of voluntariness. He may thereafter submit the question to the jury "under appropriate instructions" for their own determination. The remaining question, vital to the present case, is delineation of the standard to be utilized by the court and the jury in "reliably" determining voluntariness.

B. The Voluntariness of a Confession Can Be "Reliably" Determined Only on the Basis of the Traditional Reasonable Doubt Standard.

In his dissenting opinion in the Jackson case, Mr. Justice Black stated (378 U.S., supra, at 405):

> The Court has not said that its new constitutional rule, which requires the judge to decide voluntariness, also imposes on the [government] the burden of proving this fact beyond a reasonable doubt. Does the Court's new rule allow the judge to decide voluntariness merely on a preponderance of the evidence? If so, this is a distinct disadvantage to the defendant. In fashioning its new constitutional rule, the Court should not leave this important question in doubt."

It seems clear, however, that the Court in fact did not leave "this important question in doubt." After all, it was striking down a procedure which required exclusion of a confession by the trial court only "if a verdict that it was freely made would be against the weight of the evidence" (see People v. Leyra, 302 N.Y., supra, at 362) and which required submission of the issue to the jury "if the evidence presents a fair question as to...voluntariness..." (378 U.S., supra, at 377). A fair reading of the majority's opinion in Jackson indicates that the trial court may not decide the issue of voluntariness merely on "a preponderance of the evidence." He must find the confession to be voluntary beyond a reasonable doubt. The repeated emphasis by the majority that the issue be "reliably" determined in order to avoid

absolutely the possibility of convicting a defendant on the basis of an involuntary confession (see, e.g., 378 U.S. at 378, 386) requires the conclusion that the Court intended the voluntariness issue to be resolved "beyond any reasonable doubt." Any other standard, as Mr. Justice Black stressed, would place the defendant at a great disadvantage, particularly in the circumstances of a case like the present one where the only evidence of guilt is the confession. Further, if the judge finds the confession voluntary beyond a reasonable doubt after the preliminary hearing and admits it into evidence, the danger repeatedly referred to in Jackson that a jury will tend to believe a confession however tenuous its circumstances requires that the court specifically and carefully instruct the jury to disregard the confession unless it finds beyond a reasonable doubt that the confession was voluntarily given.

Any possible doubt that the principles of Jackson v. Denno require application of the "reasonable doubt" standard at both stages of the proceeding was laid to rest in the case of Stevenson v. Boles, 331 F.2d 939 (4th Cir. 1964), affirmed per curiam, Boles v. Stevenson, 379 U.S. 43 (1964). There the Court of Appeals affirmed the issuance of a writ of habeas corpus by the district court on the specific ground that the state trial court had failed to instruct the jury "that, unless they find beyond a reasonable doubt that the confession

was freely and voluntarily made, they should not give any consideration to the admissions in weighing guilt or innocence of defendant" (331 F.2d, supra, at 942). The Court ruled further (ibid.): "[While] no prayer for such an instruction was offered,...the question of voluntariness had been raised with sufficient point to require an express admonition to the jury by the Court sua motu" (emphasis added). On certiorari, the Supreme Court affirmed per curiam on the basis that "the procedures [of the state condemned by the Court of Appeals] were not 'fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession'" within the meaning of Jackson v. Denno (379 U.S., supra, at p. 176).

Again, in the recent case of United States v. Inman, 352 F.2d 954 (4th Cir. 1965), the Court of Appeals, stressing that "[t]he law is unsparing in its exactions that a confession, even to be ponderable by the jury, must first be found representative of the free will of the confessor" (id., at 956), spelled out in more detail the procedures which it believed necessary under Jackson v. Denno to assure "reliable" determination of voluntariness.[15/] The Court noted that even if there

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15/ While this Court has held (e.g., Hutcherson v. United States, ___ U.S.App.D.C. ___, 351 F.2d 748, 755 (1965), that Jackson v. Denno requires "express findings" by the trial court following the preliminary hearing on voluntariness if the issue is to be submitted to the jury, it apparently has not articulated the precise standard to be applied by the judge and the jury in "insur[ing] a reliable and clear-cut determination of the voluntariness of the confession..." (378 U.S. At 391). An analogy may be found in the insanity cases where the burden rests on the government, in the face of a defense of lack of criminal responsibility on the basis of a claimed mental defect, to establish beyond a reasonable doubt that the alleged crime was not the product of mental disease or defect.

is no objection to the offered confession, the trial court nevertheless must excuse the jury and hear evidence on the confession and its factual setting. The defendant must be permitted to testify at such a hearing without prejudice to his privilege not to take the stand before the jury. In its resolution of the voluntariness of the confession following such voir dire (ibid.) (emphasis added):

> [T]he district judge will evaluate the evidence to ascertain whether, after resolving any conflicts therein, it is convinced beyond a reasonable doubt that the confession was voluntary. Unless the judge is so persuaded the confession may not be admitted. If, however, he is satisfied beyond a reasonable doubt of its voluntariness, he should explicitly make and include in the record a finding of that fact.

The Court continued that if, applying the reasonable doubt standard, the Court holds that the confession may be submitted to the jury, the relevant testimony adduced at the preliminary hearing may be repeated in the jury's presence. The judge's preliminary ruling should not be disclosed to the jury by the Court or by counsel. Moreover, if the confession is admitted (ibid.) (emphasis added):

> [T]he court should instruct the jury, whether requested or not, upon the law governing the use of a confession. Stevenson v. Boles, 331 F.2d 939 (4 Cir. 1964), aff'd per curiam, 379 U.S. 43, 85 S. Ct. 13 L.Ed.2d 109. Included would be a forthright caution that before giving any weight to the confession the jury must be satisfied beyond a reasonable doubt that it had been made by the accused uninfluenced by promise of reward, threat of injury or diminution of his rights.

If this is the meaning of Jackson v. Denno in a case where there is other reliable evidence of guilt in addition to the confession (as in Boles and Inman), a fortiori the district court in making its preliminary determination in a case where the only evidence of guilt, as here, is the confession, should apply the reasonable doubt standard and carefully instruct the jury accordingly. Compare Brown v. United States, ___ U.S.App.D.C. ___, 338 F.2d 543 (1964).16/

C. The Voluntariness of Appellant's Alleged Confession in the Present Case Was Not Determined on the Basis of the Required "Reasonable Doubt" Standard.

In the present case, the district court in dismissing the petition for a writ of error stated that it "found on the basis of the evidence that the confession was voluntary, overruled the objection, and admitted the confession" (United

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16/ See also Whiteside v. United States, 346 F.2d 500, 506, n. 2 (8th Cir. 1965), where the following instruction was approved:

> The court further instructs the jury that all evidence relating to any admission or other incriminating statement claimed to have been made by a defendant outside of court should be weighed with great care.
>
> If the evidence does not convice you beyond a reasonable doubt that such admission or other incriminating statement was made voluntarily and understandingly, then you should disregard it entirely.

States v. Clifton, 239 F.Supp., supra, at 51). It stated further (ibid.):

> In its instructions to the jury the Court directed the jury to consider the question of voluntariness of the confession and to exclude the confession unless they found it was voluntary. The Court thus applied what has been called by the Supreme Court in the Jackson case the Massachusetts rule, and did not follow the so-called New York practice, which was disapproved by the Supreme Court. It may be observed that the practice followed by this Court in this instance is that traditionally and generally adopted by Federal Judges in this district.

The "traditional practice" followed by the district court in this case, however, is directly in conflict with the principles of Jackson v. Denno, as interpreted and applied in the Inman and Boles cases, supra. That "practice," which was specifically disapproved by the Supreme Court in Jackson (378 U.S. at 400; Appendix A to the Majority Opinion), involved the following (Wright v. United States, 102 U.S.App.D.C. 36, at 45, 250 F.2d 2 at 13 (1957) (emphasis added)):

> [T]he court first holds a preliminary hearing for the purpose of determining whether there is evidence from which the jury could properly conclude that the confession was voluntary. If the court concludes there is no such evidence, it must exclude the confession; but if it finds there is evidence on the basis of which it might be held to be voluntary, then the question of voluntariness is submitted to the jury.

Thus, by stating that he followed the "traditional practice" in this district, the court below has virtually conceded that the procedures utilized in determining the voluntariness of appellant's confession do not meet the constitutional criteria laid down in Jackson. See Hutcherson v. United States, ___ U.S.App.D.C. ___, 351 F.2d 748 (1965); Green v. United States, ___ U.S.App.D.C. ___, 351 F.2d 198 (1965).

Moreover, examination of the record, and particularly the court's charge to the jury, demonstrates beyond question that the trial court did not find appellant's confession to be voluntary beyond a reasonable doubt and did not caution the jury that before attaching any weight to the confession the jury should be satisfied beyond a reasonable doubt that it was voluntary. True, in the early part of its charge (Instructions, pp. 3-4) the court gave the jury the standard "reasonable doubt" instruction. See Statement, supra, p. 10. This instruction, however, was never made clearly applicable to the issue of voluntariness. See McAffee v. United States, 70 U.S.App.D.C. 142, at 147-148, 105 F.2d 21, at 26-27 (1939) (rejecting the argument that a jury has the capacity "to understand the implications of instructions..."). On this issue, the court below stated (Instructions, pp. 6-7):

> The law does not admit...a confession that is obtained by duress, coercion, by force, or as a result of an inducement. A confession obtained by these means must be rejected and disregarded by the jury....

> The defense claims in this case that the confessions were obtained as a result of coercion and that is the principal question in the case.
>
> * * *
>
> The defendants claim that the confessions were false and were obtained as a result of severe beatings. If this assertion is true, the officers were guilty of very grave and severe misconduct and of an illegal act. The officers deny, however, that they beat the defendants, or that they ill-treated them in any way....
>
> It is for you members of the jury to decide whom to believe on this vital issue--the officers or the defendants.

It is clear from the above, and from a reading of the entire charge to the jury, that the district court couched its instructions concerning the voluntariness of the confession solely in terms of the credibility of witnesses rather than in terms of the jury being satisfied beyond a reasonable doubt that the confession was voluntary. In such a swearing contest, however, "the testimony of a lone defendant under these circumstances is ordinarily no match for testimony from several police officers who could not, of course, be expected to admit brutality in any event, since one who would be guilty of such conduct would find little difficulty in denying it under oath" (Muschette v. United States, 116 U.S.App.D.C. 239, 243, 322 F.2d 989, 993 (1963) (dissenting opinion of Judge Wright), reversed on the authority of Jackson v. Denno, Muschette v. United States, 378 U.S. 569 (1964)).

Moreover, the district court virtually withdrew even the issue of credibility from the jury in the following instruction (pp. 7-8):

> You will recall that the defendant Clifton produced a shirt which he says he wore at the time of questioning. When produced in Court, the shirt was torn, badly torn, and stained. The defendant says that the shirt was torn and spattered with blood as a result of the beatings he claimed to have received at the hands of the officers. Of course we have only his uncorroborated testimony that this is, in fact, the shirt that he wore on that occasion, and that its present condition is the result of what he says occurred on that occasion. Consequently, the question of fact again comes down to -- whom are you going to believe, the defendants or the officers, and that is for you to decide.
>
> There is one circumstance that perhaps may or may not be significant according to what you think of it:
>
> If it be true that defendants Clifton and Moore were beaten into a confession, why didn't the same thing happen to the defendant Hines and why wasn't a confession obtained from him in the same reprehensible manner? And yet, the officers testified that they questioned Hines, but Hines did not confess and did not admit the commission of the offense.

The first part of this curious instruction required the jury to make the very large inference that appellant, an eighteen-year old youth with limited schooling, was sufficiently sophisticated to arrange for someone on the outside[12/] to obtain a shirt of approximately his size, to

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12/ It is undisputed that at all relevant times appellant was under custody of the police or in jail.

spatter it with blood, to tear it badly, and to sneak the garment into him under the watchful eyes of the police and his jailers in order that appellant might fabricate a story of police coercion and brutality. This part of the instruction, together with that part dealing with the absence of a confession on the part of Hines, constituted a virtual judicial declaration to the jury that appellant was not to be believed and that the officers' denials of mistreatment were to be afforded decisive weight. This statement of the court, "which he made with all the persuasiveness of judicial utterance" during the solemnity of the final charge (Quercia v. United States, 289 U.S. 466, 472 (1933)), "goes well beyond the bounds of permissible comment on the evidence" (Godfrey v. United States, ___ U.S.App.D.C. ___, 353 F.2d 456, 458 (1966)) and constitutes reversible error even though no objection was taken below (ibid.).

Notwithstanding what amounted in essence to a directed verdict of guilty, the jury apparently experienced great difficulty in reaching a final verdict. It retired at 11:15 in the morning of April 5, 1946, following the court's charge (Trial Notes, p. 46). At 3:55 in the afternoon, some four and one-half hours later, the jury apparently reported that it was deadlocked and unable to reach a verdict. In any

event, the jury was recalled and the court gave the so-called "Allen" instruction[18/] to the effect that if a majority of the jury had voted for a verdict of either guilty or innocent, the minority should honor the views of the majority and endeavor to reach a unanimous verdict. Thereafter, at 4:50 in the afternoon the jury returned with a verdict of guilty.

It is submitted that, contrary to the statement of the district court in the present case that it followed the principles of Jackson v. Denno, the procedures actually utilized in determining the voluntariness of appellant's confession fall woefully short of the due process requirements established by the Supreme Court in that decision. The court below made no specific findings on the issue in 1946, and any that may be ascertainable from the record are based on the improper standard of credibility of witnesses rather than the required standard of reasonable doubt. More important, the court erred in failing expressly to

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18/ Based on the instruction approved in the early case of Allen v. United States, 164 U.S. 492 (1896), the "Allen" instruction has been characterized as the "dynamite" charge by the Court of Appeals for the Fifth Circuit (Green v. United States, 309 F.2d 852 at 854 (5th Cir. 1962)). In Colorado it is called the "third degree" instruction (Leach v. People, 112 Colo. 120, 146 P.2d 346, 347 (1947)) and in New Mexico the "Allen" charge has been called the "shotgun instruction" (State v. Nelson, 63 N.M. 428, 321 P.2d 202, 204 (1958)).

instruct the jury that before it could convict appellant it must find beyond a reasonble doubt that his confession had been voluntarily given since his incriminating statements constituted the sole evidence of his guilt of the crime of robbery. Indeed, in the inherently coercive circumstances of the present case, where appellant was unnecessarily and unlawfully detained by his police interrogators for a period of five days and where he was never informed of his absolute rights to remain silent and to procure counsel, it would seem impossible for reasonable men to find appellant's confession voluntary beyond a reasonable doubt.

D. Jackson v. Denno Is to Be Applied Retroactively.

An alternate basis for the district court's dismissal of the petition for a writ of error was its "view that the ruling by the Supreme Court in the Jackson case must be deemed to operate only in futuro..." (239 F.Supp., supra, at 50-51).[19] This view is completely erroneous, for the

[19] "Otherwise," the court said, "there would be a large scale jail delivery all over the country, and a liberation and restoration to freedom of numerous criminals, all to the danger of the citizenry" (id., at 51). This statement, of course, completely begs the question, or, more precisely, assumes, incorrectly, the very answer to it, i.e., that accused persons signing away their lives do so only on a voluntary basis and are invariably guilty. As Professor Sutherland recently observed (Crime and Confession, 79 Harv. L. Rev. 21, at 37 (1965)): "The underlying vice in the confession cases is the involuntary 'voluntariness' which until recently we have somehow come to think adequate to justify depriving a man of a deep rooted constitutional privilege. We have been ready to let a man sign away his life under circumstances in which we would not recognize his conveyance of a subdivided lot. Sooner or later this was bound to end."

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Supreme Court itself has made it clear that the due process requirements spelled out in the Jackson case are to be applied retroactively.

Thus, in the case of Boles v. Stevenson, 379 U.S. 43 (1964), the defendant was convicted of murder in a West Virginia state court and the conviction was affirmed on appeal by the West Virginia Supreme Court of Appeals. The Supreme Court of the United States denied certiorari (see 372 U.S. 938). Subsequently, the defendant filed a petition for a writ of habeas corpus in the federal district court. That court issued the writ on the ground that the state courts had applied an erroneous standard for determining the voluntariness of an oral admission of guilt contained in the testimony of three state police officers.

The Court of Appeals for the Fourth Circuit affirmed the issuance of the writ (Stevenson v. Boles, 331 F.2d 939 (5th Cir. 1964)). The Court held that the defendant was denied a fair and effective resolution of the voluntariness issue at trial when the trial court failed to hold a preliminary hearing on this issue and failed to submit it to the jury under an instruction "that, unless they find beyond a reasonable doubt that the confession was freely and voluntarily made, they should not give any consideration to the admissions in weighing guilt or innocence of the defendant" (331 F.2d, supra, at 942). The Supreme Court granted certiorari

and affirmed the decision of the Court of Appeals, stating (379 U.S., supra, at 176): "We think the procedures were not 'fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession.' Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 1778, 12 L.Ed.2d 908."

Moreover, in the recent case of Linkletter v. Walker, 381 U.S. 618, at 628, n. 13 (1965), where the Supreme Court refused to give retrospective effect to the exclusionary rule of Mapp v. Ohio, 367 U.S. 643 (1961), the Court referred to a number of cases where newly evolved constitutional doctrine was to be applied retroactively. These cases included Jackson v. Denno, with the Court pointing out that the new and mandatory procedures for determining the voluntariness of a confession were applied retroactively in the Jackson case itself since the petitioner was collaterally attacking a previously final judgment of conviction (381 U.S. at p. 628, n. 13).[20/] The Court noted that the proper test for determining

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20/Other cases referred to by the court as having retroactive effect were Eskridge v. Washington State Prison Board, 357 U.S. 214 (1958), applying to a 1935 conviction the rule of Griffin v. State of Illinois, 351 U.S. 12 (1956), which required the state to furnish transcripts of the trial to indigents on appeal; and Gideon v. Wainwright, 372 U.S. 335 (1963), requiring that a state appoint counsel to represent an indigent defendant charged with a felony. For a partial list of both state and federal court decisions, which have uniformly applied Jackson retroactively, see Trotter v. v. Stephens, 241 F.Supp. 33 at 45, n. 40 (D.C. Ark. 1965).

retrospective operation is whether the new rule "went to the fairness of the trial--the very integrity of the fact-finding process" (id., at p. 639).[21] It noted that Jackson was to be applied retroactively since its "holding went to the basis of fair hearing and trial because the procedural apparatus never assured the defendant a fair determination of voluntariness" (id., at n. 20). The district court clearly erred, therefore, in holding that the Jackson case was to operate only in futuro.

II. APPELLANT'S CONFESSION, THE SOLE EVIDENCE OF HIS GUILT, WAS OBTAINED NOT EARLIER THAN THE THIRD, AND POSSIBLY AS LATE AS THE FIFTH DAY OF A PERIOD OF UNLAWFUL DETENTION AND SHOULD HAVE BEEN EXCLUDED.

As set out more fully in the Statement, supra, appellant was arrested on February 28, 1946 on a charge of robbery (Trial Notes, p. 43). On the third day following his arrest, or on March 2, 1946, during a session of police interrogation, appellant made certain admissions to the police officers implicating himself and the co-defendants in the crime. He was questioned again two days later on March 4, 1946, in the office of the Robbery Squad (id., p. 42). Finally, on Tuesday, March 5, 1946, appellant was presented

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21/ It has been said that this standard embraces the question whether the new rule would increase "the reliability of the processes for determining guilt" (Mishkin, The Supreme Court 1964 Term - Forward: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 95 (1965)). See also Tehan v. United States, 86 S. Ct. 459 (January 19, 1966).

to a magistrate for commitment. It is submitted that appellant's confession obtained during this five-day period of detention in police custody should have been excluded since appellant, contrary to law, was not promptly taken before a committing authority.

Under the circumstances of this case it is clear that appellant's confession was obtained in blatant violation of the ruling in McNabb v. United States, 318 U.S. 332 (1943), as codified in Rule 5(a) of the Federal Rules of Criminal Procedure, that an arrested person be taken before a committing authority without unnecessary delay.[22/] Since the confession at issue was not obtained until the third, and possibly not completed until as late as the fifth day of this period of unlawful custody, appellant's confession was not given at the "threshold" in response to initial questioning by the police (Alston v. United States, ___ U.S.App.D.C. ___, 348 F.2d 72, 73 (1965); see also Naples v. United States, 113 U.S.App.D.C. 281, 307 F.2d 618 (1962)). Neither is there room for application of the "continuous movement doctrine" (Perry v. United States, ___ U.S.App.D.C. ___, 347 F.2d 813, 820 (1965) (dissenting opinion)), or any other principle avoiding the exclusionary rule of McNabb on the basis of "spontaneity."

22/ Rule 5 became effective on March 21, 1946. See Rule 59; 91 Cong. Rec. 12545; Upshaw v. United States, 335 U.S. 410 (1948). Appellant's trial in the present case began on April 4, 1946.

The short of the matter is that appellant was shuffled back and forth between the Thirteenth Precinct, the Second Precinct, and the Robbery Squad interrogation room at police headquarters for the sole purpose of permitting police questioning "for the production of evidence" (Greenwell v. United States, ___ U.S.App.D.C. ___, 336 F.2d 962, 966 (1964)). The delay "was utilized to obtain a confession by secret police interrogation...[and] a confession so obtained...is not admissible under Mallory"[23] (Spriggs v. United States, 118 U.S.App.D.C. 248, 251, 335 F.2d 283, 286 (1964); Greenwell v. United States, supra; Alston v. United States, supra; Queen v. United States, 118 U.S.App.D.C. 262, 335 F.2d 297 (1964); Johnson v. United States, ___ U.S.App.D.C. ___, 344 F.2d 163 (1964); Ricks v. United States, 118 U.S.App.D.C. 216, 334 F.2d 964 (1964.

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[23] No question is presented here concerning the possible retroactive application of Mallory v. United States, 354 U.S. 449 (1957), Upshaw v. United States, 335 U.S. 410 (1948), or any of their progeny. As this Court has made clear, the original doctrine requiring that an arresting officer bring an accused before a committing authority as quickly as possible is contained in McNabb. Mallory and Upshaw merely explain that doctrine (Greenwell v. United States, ___ U.S. App.D.C. ___, 336 F.2d 962, at 965 (1964)). See also Spriggs v. United States, 335 F.2d, supra, at 286 ("We bear in mind that Mallory is a reaffirmation and clarification of McNabb v. United States, 318 U.S. 332, 344, 63 S.Ct. 608, 614, 87 L.Ed. 819, where the Court in 1943 had said that the statutory predecessor of Rule 5(a) 'aims to avoid all the evil implications of secret interrogation of persons accused of crime'").

Since the only evidence of appellant's guilt was his inadmissible confession, the district court erred in failing to direct a judgment of acquittal as to appellant, just as it did do in the case of the defendant Hines from whom the police were unable to secure a confession.

III. UNDER THE CONSTITUTIONAL DOCTRINE OF ESCOBEDO v. STATE OF ILLINOIS, WHICH SHOULD BE APPLIED RETROSPECTIVELY, THE ADMITTED FAILURE OF THE POLICE INTERROGATORS TO INFORM APPELLANT OF HIS CONSTITUTIONAL RIGHTS TO REMAIN SILENT AND TO OBTAIN COUNSEL VOIDS A CONVICTION BASED SOLELY ON HIS UNCOUNSELED CONFESSION.

No claim is made here that a confession may not be received into evidence under any circumstances if made by an accused without benefit of counsel. Compare Jackson v. United States, 119 U.S.App.D.C. 100, 104, 337 F.2d 136, 140 (1964), cert. denied 380 U.S. 935 (1965). It is submitted, however, that in the unique situation presented by this case, where the appellant was detained in police custody for the purpose of extracting a confession from him, the ruling in Escobedo v. State of Illinois, 378 U.S. 478 (1964), requires that his uncounseled confession be excluded.

In Escobedo, which was a logical and necessary extension of the court's previous ruling in Messiah v. United States, 377 U.S. 201 (1964),[24/] the Supreme Court extended

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[24/] In Messiah, the petitioner had already been indicted and was free on bail when the police obtained incriminating statements from him by installing a radio transmitter in the automobile of Messiah's alleged partner in crime. The court treated such questioning as an interrogation by the police and held that at this post-indictment point in the proceedings the right to counsel attached. It was ruled that the incriminating statements were to be suppressed independent of any issue of the voluntariness of the confession.

the right to counsel to a person who had been neither indicted nor arraigned but who had been taken into police custody and was being held for interrogation. While being detained by the police, Escobedo requested permission to see his retained counsel, with whom he had conferred shortly prior to his interrogation. In fact, Escobedo's attorney was at the police station during the interrogation and attempted to speak to the accused but was denied access to him by the police. The Supreme Court held that it was error not to suppress Escobedo's subsequent confession to the crime. The Court stated (378 U.S., supra, at 490-91):

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution...and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

Escobedo makes clear that the Sixth Amendment right to counsel, which in a confession case is closely related to the Fifth Amendment privilege against self-incrimination, attaches at some point between arrest and presentment to the magistrate for commitment. With but one exception discussed below, all of the criteria enumerated by the Supreme Court in Escobedo for the determination of when and where that right attaches are met in the present case.

Thus, it is clear that when appellant made his first incriminating statements on the third day after his arrest, the police investigation was not an unparticularized inquiry with respect to an unsolved crime but was an accusatory process focused directly on the appellant. Carried out while the accused was all alone in the sinister venue of the police station,[25/] the process of interrogation obviously was designed to elicit incriminating statements from the appellant. It is admitted that at no time during the questioning of appellant was he informed of his absolute constitutional right to remain silent or of his right to obtain counsel.

The only possible distinction between the situation presented in this case and that in Escobedo is the fact that here appellant made no request to obtain or to consult with a lawyer. Clearly, however, this is a difference without a meaning. As Mr. Justice White stated in his dissenting opinion in Escobedo (378 U.S., supra, at 495):

> Although the [majority] opinion purports to be limited to the facts of this case, it would be naive to think that the new constitutional right announced will depend on whether the accused has retained his own counsel or has

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25/ See Note, An Historical Argument for the Right to Counsel During Police Interrogation, 73 Yale L. J. 1000, at 1043 (1964) ("Interrogation, the manuals say, should be conducted in private, in a small, bare room with no windows and with but one door, so that the interrogated person can have nothing to distract him from the persistence of the interrogator. Privacy is essential, since a man will reveal in private what he never would reveal in a group").

> asked to consult with counsel in the course of interrogation....At the very least the Court holds that once the accused becomes a suspect, and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel.[26/]

Recognizing the validity of Mr. Justice White's intimation of the absurdity of requiring suspects specifically to request counsel as a condition to the attachment of Sixth Amendment rights, the Court of Appeals for the Third Circuit has squarely ruled that a request for counsel is not a prerequisite for the right to counsel at the interrogation stage. Noting that at every other stage of criminal proceedings to which the right to counsel attaches, the right does not depend on a request and the absence of a request does not constitute a waiver, the Court stated (United States ex rel. Russo v. State of New Jersey, 351 F.2d 429, 438 (3rd Cir. 1965):

> The request by Escobedo to consult with his attorney is in and of itself evidence that he was aware of his constitutional rights. Thus, it would seem that to suppress a confession of one knowledgeable of

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26/ Mr. Justice White clearly assumed that the rationale of Gideon v. Wainwright, 372 U.S. 335 (1963), which he cited, requires that there be a right to appointed counsel whenever there is a right to retained counsel. His dissent was based in large part on his fear that the majority opinion would push the right to counsel, retained and appointed, back to the police station during preliminary interrogation and cripple present law enforcement procedures.

> his rights but who has none the less confessed and to admit into evidence a confession of one who might be unaware of his rights at the time of his confession would be sophistry.

The Court recognized that there is an approximately even split of opinion in the state courts as to whether a request is necessary before the Escobedo rationale may become operative (id., at 438-439). It noted, however, that an overwhelming majority of the reported decisions in the federal courts were favorable to the view that if the rights recognized by Escobedo are sufficently important to constitute due process requirements, they should be made available to the ignorant and inexperienced as well as to the informed and sophisticated (id., at 439-40).[27/] See also Commonwealth of Pennsylvania v. Moroney, 348 F.2d 22 (3rd Cir. 1965).

27/ The Court of Appeals in Russo also noted that this Court "has in dictum agreed with the result we reach here" (id., at 440), citing Greenwell v. United States, ___ U.S.App.D.C. ___, 336 F.2d 962, 966 (1964), Queen v. United States, 118 U.S.App.D.C. 262, 335 F.2d 297 (1964), and Ricks v. United States, 118 U.S.App.D.C. 216, 334 F.2d 964 (1964). In this Court's recent en banc decision in Harrison v. United States, ___ U.S.App.D.C. ___, ___ F.2d ___ (No. 17991; Opinion released December 7, 1965), it was stated that "[t]here are varying views as to whether an adult offender must request counsel in order to invoke Escobedo." Since it reversed Harrison's convictions on other grounds, the Court stated: "We do not reach this question." Cf. Kennedy v. United States, ___ U.S.App.D.C. ___, 353 F.2d 462 (1965).

The only remaining consideration is whether Escobedo is to be applied retroactively in collateral attacks on previously final judgments of conviction. The Supreme Court in the recent case of Linkletter v. Walker, 381 U.S. 618 (1965), has stated that whether a newly announced constitutional rule will receive retroactive application depends on whether the new principle involves "the fairness of the trial--the very integrity of the fact-finding process" (id., at 639).[28/] See also Tehan v. United States, 86 S.Ct. 459 (1966). The principle of Escobedo clearly comports with this requirement. As stated by Judge Forman in his concurring opinion in the Russo case (351 F.2d, supra, at 443):

> When a conviction is sought assisted by the introduction of a confession, failure to apply the Escobedo rule (which now enables an accused to properly exercise his rights at the accusatory stage of the proceeding and maximizes the ability of the judiciary to rule on the voluntariness of a confession) has the potential to impair the fairness of a trial and to weaken the integrity of the fact finding process.... I would clearly state that Escobedo has been given retroactive effect in these cases.

While the Court of Appeals for the Third Circuit, contrary to Judge Forman's desire, did not specifically state that it was applying Escobedo retroactively, it clearly did

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28/ The court cited as illustrative of cases meeting this standard of retroactive operation: Griffin v. State of Illinois, 351 U.S. 12 (1956), Gideon v. Wainwright, 372 U.S. 335 (1963), and Jackson v. Denno, 378 U.S. 368 (1964).

in Russo as well as in the subsequent case of Commonwealth of Pennsylvania v. Moroney, 348 F.2d 22 (1965), both of which involved collateral attacks on convictions which had become final prior to the decision in Escobedo. Similarly, the Court of Appeals for the Fifth Circuit stated in the recent case of Collins v. Beto, 348 F.2d 823 (1965), that:

> The question of the retroactivity of the Escobedo rule is settled in this Circuit.... In this Circuit, the basis for retrospective application of an exclusionary rule has been a finding that the object of the rule is 'to provide fairness in the trial itself,' [citing Pate v. Holman, 341 F.2d 764, at 776]....The Escobedo rule fits into this categorization.

The Escobedo rule has been applied retrospectively in the following federal cases, among others: Kerrigan v. Scafati, 348 F.2d 187 (1st Cir. 1965); Miller v. Warden, Maryland Penitentiary, 338 F.2d 201 (4th Cir. 1964); Latham v. Crouse, 338 F.2d 658 (10th Cir. 1964); Smith v. United States, 347 F.2d 505 (7th Cir. 1965); Loftis v. Eyman, 350 F.2d 920 (9th Cir. 1965); United States v. Herold, 349 F.2d 372 (2d Cir. 1965).

It is submitted that the reasoning of the Russo case should be followed by this Court. Closely related to the principles of Jackson v. Denno, the ruling in Escobedo clearly is designed to improve the procedures for ascertaining the truth in criminal cases and to render the very guilt determining process more reliable. As such, it qualifies under the test of Linkletter as a rule requiring retrospective operation.

Conclusion

The record in this case, while sparse, fairly bristles with error of constitutional proportions. Appellant's alleged confession was the only evidence connecting him in any way to the crime with which he was charged. It is clear that this confession was unlawfully obtained, and that no determination that it was voluntary beyond a reasonable doubt was or could be made. Since appellant's confession cannot be used against him in any way, the case should be reversed and remanded to the district court with instructions to vacate and set aside the 1946 judgment of conviction.

Respectfully submitted,

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888 Seventeenth Street, N.W.
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March 7, 1966

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

Constitutional Provisions Involved

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall be...compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law....

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall...have the Assistance of Counsel for his defence.

Rule Involved

Rule 5(a) of the Federal Rules of Criminal Procedure provides:

> An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

APPELLANT'S REPLY BRIEF

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 19,757

NATHANIEL CLIFTON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from a Final Order
of the United States District Court
for the District of Columbia

1966

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888 Seventeenth Street, N.W.
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April 28, 1966

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APPELLANT'S REPLY BRIEF

The basic issue presented on this appeal is whether the voluntariness of appellant's uncounseled confession was reliably determined within the meaning of Jackson v. Denno, 378 U.S. 368 (1964), when the district court failed to determine that the confession was voluntary beyond a reasonable doubt and similarly failed to instruct the jury that

before appellant could be convicted, the jury would have to find that the confession upon which such a conviction would rest, since it was the only evidence of guilt presented, was voluntary beyond any reasonable doubt. More specifically, a question is presented whether in the exceptional circumstances of this case, where appellant was unlawfully detained and where he admittedly was never informed of his constitutional rights by his police interrogators,[1/] either the district court in its preliminary resolution of the voluntariness issue or the jury upon submission of the confession to it could, as a matter of law, find appellant's confession voluntary beyond a reasonable doubt even if this standard had been used.

Contrary to the Government's apparent understanding (see Brief, pp. 13, 14, 17), no contention was or is made that appellant was not afforded "an independent" hearing on the issue of voluntariness in the sense that the jury was excused and testimony was adduced out of their presence relating to the underlying issues of coercion and duress.

1/ The Government does not dispute that the confession was obtained during a five-day period of unlawful detention by the police, the purpose of which was interrogation designed to elicit a confession. Nor does the Government dispute that appellant was never informed during his detention in police custody of either his absolute right to remain silent or his right to procure counsel.

Nor is it contended that the district court, following the preliminary hearing, did not make an independent and separate decision with respect to the voluntariness of the confession in the sense that he "found" the confession was voluntary on the basis of some unspecified standard, overruled the objection (Trial Notes, p. 43), and admitted the confession into evidence.

While the Government from time to time in its answering brief purports to discuss the basic issue of the standard to be applied both by the trial court and the jury in "reliably" determining the voluntariness of a confession, it carefully refrains from ever really coming to grips with this fundamental problem. Rather, in the face of a record showing beyond question that a manifest miscarriage of justice has occurred, the Government relies principally on such superficial technicalities as the failure of the indigent appellant more nicely to plead his case in the petition for a writ of error coram nobis. As a result, the Government finds itself in the anomalous position of arguing, in effect, that even if appellant's confession was in fact involuntary, nevertheless its voluntariness was "reliably" determined within the meaning of Jackson

and other applicable cases.[2] This reply brief will demonstrate (1) that the Government's attempt to avoid discussion of the issues must be rejected, (2) that the questions whether a proper standard was utilized in determining the voluntariness of appellant's confession and whether, as a matter of law, that confession could have been found voluntary beyond a reasonable doubt are properly before the Court, and (3) that the Government has in no way refuted appellant's contention that his unlawful 1946 conviction should be set aside. First, however, the reply will dispose of the Government's suggestion that even if appellant's 1946 conviction was unlawful and should, under ordinary circumstances, be set aside, such relief would have no "practical effect" (Brief, p. 5) because of appellant's other felony convictions in the District of Columbia.

I. THE "PRACTICAL EFFECT" OF VACATING APPELLANT'S UNLAWFUL 1946 CONVICTION COULD BE HIS IMMEDIATE RELEASE FROM PRISON.

The Government concedes that under the rationale of Morgan v. United States, 346 U.S. 502 (1954), the issues

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[2] The Government states (Brief, p. 10) that the Court in Jackson "devised a method for ascertaining, in the case of already final convictions, whether the jury in fact had before it an involuntary confession" and "if an involuntary confession was introduced the reliability of the trial as a fact-finding process is seriously impuned [sic]" (emphasis added).

raised on this appeal are not moot. It states, however, that "it is questionable whether any practical effect would actually occur even if the present attack proved successful" (Brief, p. 5). In this connection, the Government asserts that "[a]ppellant has numerous other convictions which would constitute prior felony convictions for purposes of resentencing appellant as a third offender in New York should he be successful on this appeal" (ibid.). It is submitted, however, that whether any or all of the three additional convictions referred to by the Government may be used for enhancement purposes under the New York recidivist statute (New York Penal Law, Section 1941) is strictly a matter for the New York courts to determine and should not be the subject of speculation either by the Government or by this Court.

In point of fact, there is substantial evidence that appellant's prior felony convictions in the District of Columbia could not, or at least would not, be used for purposes of resentencing appellant as a third felony offender in the event his unlawful conviction in the present case is set aside. First, the records in the Nassau County Court in People v. Clifton (Indictment No. 16597), including an information filed by the District Attorney of the County of Nassau pursuant to Sections 1941

and 1943 of the New York Penal Law, indicate that the New York court had before it all of appellant's previous felony convictions and deemed it appropriate to sentence appellant only as a third, rather than a fourth, felony offender.[2a/]

The Government refers to appellant's conviction for grand larceny in January, 1946 in Criminal No. 76105 (Brief, p. 5, n. 9). This conviction was not used by the Nassau County Court in enhancing appellant's present sentence for the obvious reason that the larceny for which appellant was convicted in the District of Columbia, while a felony here, would constitute mere petit larceny under New York law, which is only a misdemeanor in that state, and thus is not available for purposes of enhancement under Section 1941. See New York Penal Law, Sections 1294, 1296 1298, and 1299; see also People v. Olah, 300 N.Y. 96, 89 N.E.2d 329 (1949); People v. Stein, 17 N.Y.Crim. 252, 80 App. Div. 357, 80 N.Y. Supp. 847 (1903).

Moreover, the circumstances surrounding appellant's conviction on a charge of robbery in 1956 in Criminal No. 1146-54

2a/ Re-use of any or all of these convictions to enhance a sentence after its original imposition and start of service could present serious questions of double jeopardy under the Fifth Amendment. Compare Ex Parte Lange, 18 Wall. 163 (1873); United States v. Rosenstreich, 204 F.2d 321 (3rd Cir. 1953); Duggins v. United States, 240 F.2d 479 (6th Cir. 1957).

strongly suggest the possible invalidity of that conviction,[3/] and appellant would be entitled under Section 1943 of the New York Penal Law to challenge the conviction as having been obtained in violation of his rights under the United States Constitution. Left for possible use upon resentencing of appellant would be his 1946 conviction in Criminal No. 76,575. Use of that conviction, of course assumes that the State of New York, having failed to use it for enhancement purposes in the first instance, would not be estopped from resurrecting it upon appellant's success in the present case and would otherwise elect to attempt to use the conviction against the appellant in any subsequent resentencing procedures.

Thus, notwithstanding appellant's other felony convictions in the District of Columbia, there is absolutely no support for the Government's assertion that these other

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3/ The docket entries in Criminal No. 1146-54 indicate that following appellant's trial, the trial court on its own motion ordered two psychiatric examinations of the appellant, both of which indicated that he was of "unsound mind." Accordingly, on June 10, 1955, the court sua sponte ordered that the conviction of the appellant on March 8, 1955 "be and the same is hereby vacated and held for naught and it is further ordered that the defendant be committed to the custody of the Attorney General until he is mentally competent to stand trial or until the pending charges are disposed of." Almost one year later, or on May 24, 1956, the court entered a finding that the appellant was then mentally competent to stand trial and a new trial apparently was held on June 21, 1956. On July 13, 1956, appellant was sentenced to a term of imprisonment of from one to three years for attempted robbery. Compare Pate v. Robinson, _____U.S._____, 86 S.Ct. 836 (1966).

convictions "would constitute prior felony convictions for purposes of resentencing appellant as a third offender in New York should he be successful in this appeal (Brief, p. 5). If appellant's unlawful 1946 conviction challenged in this case is set aside, he would be entitled as a matter of law to move for a reduction of sentence. This could result in his release from prison almost immediately. It is emphasized, however, that these are matters for the New York courts and the Government's speculation as to what may or may not occur in subsequent proceedings in those courts cannot serve to defeat appellant's clear right to have his unlawful conviction in Criminal No. 76574 vacated and set aside.

II. THE TRIAL COURT DID NOT, FOR AS A MATTER OF LAW IT COULD NOT, FIND APPELLANT'S UNCOUNSELED CONFESSION, OBTAINED DURING A FIVE-DAY PERIOD OF UNLAWFUL POLICE DETENTION, VOLUNTARY BEYOND A REASONABLE DOUBT.

The Government assumes, arguendo, "that the standard at both stages of the voluntariness determination might be proof beyond a reasonable doubt" (Brief, p. 16; emphasis added).[4/] The Government seems to argue, however, that

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[4/] If the standard for establishing voluntariness "might" be proof beyond a reasonable doubt in any case, it seems clear that such a standard should be used here where the only evidence of guilt was the confession and where resolution of the voluntariness of the confession would decide the ultimate question of guilt or innocence.

(1) the standard of proof to be utilized by both the court and the jury has not been definitively decided; (2) the district court, in stating that it "found...that the confession was voluntary," applied whatever standard it should have; and (3) standards of proof, as contrasted with other aspects of procedures utilized in the reliable determination of voluntariness, are not subject to collateral attack. These arguments are completely without merit.

In his opening brief, appellant argued that the district court did not apply a reasonable doubt standard in determining the voluntariness of the confession because he specifically stated:

> It may be observed that the practice followed by this Court in this instance is that traditionally and generally adopted by Federal Judges in this district.

It was pointed out that the "traditional practice" referred to required submission of the issue of voluntariness to the jury if there was conflicting evidence on the basis of which the confession might be held to be voluntary, and that this plainly was not a standard of reasonable doubt.

The Government concedes (Brief, p. 14) that the statement of the district court quoted above is not altogether "untroublesome if one assumes the tradition to be as stated by appellant" (emphasis in original). But appellant's understanding of the practice in this district

is based on such cases as Wright v. United States, 102 U.S.App. D.C. 36, at 45, 250 F.2d 4, at 13 (1957); Catoe v. United States, 76 U.S.App.D.C. 292, at 295, 131 F.2d 16, at 19 (1942); and McAffee v. United States, 70 App.D.C. 142, at 145, 105 F.2d 21, at 24 (1939), cert. denied, 310 U.S. 643, all of which approved submission of the voluntariness issue to the jury if the trial court found after a preliminary hearing that a fair question as to voluntariness was raised by the voir dire evidence.

Moreover, appellant's "understanding" of the practice in the District of Columbia before the decision of the Supreme Court in Jackson is exactly the same as that of the Government. Thus, in Pea v. United States, 116 U.S.App.D.C. 410, 324 F.2d 442 (1963), the Government argued in its "Brief... in Opposition to the Granting of a Petition for a Writ of Certiorari" (p. 6):

> The issue of the voluntariness of a confession is submitted to a jury in the District of Columbia except where the evidence is such that on no reasonable view can the confession be deemed voluntary [citing Wright v. United States, supra]. Since, on this record, there was ample evidence to support a conclusion that petitioner's condition did not preclude the making of a voluntary confession, the trial judge correctly ruled that the confession was admissible. His full and complete instructions to the jury as to its consideration of the confession are not questioned.

The Supreme Court granted the petition for certiorari and summarily reversed on the basis of Jackson v. Denno (Pea v. United States, 378 U.S. 571 (1964)). See also Muschette v. United States, 116 U.S.App.D.C. 239, 322 F.2d 989, reversed on the authority of Jackson, 378 U.S. 569 (1964). Thus, the understarding of both the appellant, the Government and the Supreme Court of the "traditional practice" in the District of Columbia is precisely the same. That practice clearly does not require the trial court to determine voluntariness beyond a reasonable doubt and it has been specifically condemned by the Supreme Court in Jackson, Pea, and Muschette.[5/]

The appropriate federal standard for the trial court to utilize in its preliminary determination of voluntariness was spelled out in the case of United States v. Inman, 352 F.2d 954 (4th Cir. 1965). Since the Government does not

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5/ In a footnote (Brief, pp. 16-17, n. 40), the Government summarily disposes of the case of Stevenson v. Boles, 331 F.2d 939 (4th Cir. 1964), affirmed per curiam, 379 U.S. 43 (1964), on the asserted basis that the Supreme Court affirmed only because of the absence of any preliminary hearing by the trial court and "did not deal with the standard of proof." This clearly is not the case, however, for the Court specifically stated (379 U.S. at 45): "[W]e do not know if the trial judge decided voluntariness one way or the other, and if he did what standard was relied upon. We think the procedures were not 'fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession' [citing Jackson v. Denno]" (emphasis added).

challenge the correctness of the Inman decision, it must be in substantial agreement with the following procedures (352 F.2d at 956; emphasis added):

> [T]he district judge [after a preliminary hearing] will evaluate the evidence to ascertain whether, after resolving any conflict therein, it is convinced beyond a reasonable doubt that the confession was voluntary. Unless the judge is so persuaded the confession may not be admitted.

As in the case of the Boles decision, supra, the Government relegates Inman to an obscure footnote (Brief, p. 16, n. 40), and argues (id., at p. 17) that there is no reason why the admissibility of confessions should not be treated as an ordinary question of "evidentiary admissibility" where it has never been thought that "the appropriate test was 'beyond a reasonable doubt.'"[6/]

6/ The reason, of course, is the absolute constitutional requirement that a conviction may not be based in whole or in part upon an involuntary confession, the use of which is not only fundamentally unfair but may produce an unreliable result. See, e.g., Perry's Case, 14 How. State Trials 1312 (1660), where one of two brothers confessed that he, his mother, and brother had murdered his master, and all were executed; two years later the master returned home explaining that he had been kidnapped and sold to the Turks. Moreover, the impact of a confession on the jury will usually be so overwhelming that one commentator has suggested that the preliminary determination of voluntariness should be based on an even stricter standard than "reasonable doubt," although he does not offer a definition of such a standard (Note, Developments in the Law of Confessions, 79 Harv. L. Rev. 935, 1070-71 (1966)).

Nor is there merit in the Government's suggestion (e.g., Brief, pp. 13, 15) that the court's statement that it "found" appellant's confession "voluntary" must mean that it applied whatever standard it should have in resolving that issue. While the statement relied upon by the Government may indicate that the district court thought the confession was voluntary, and, indeed, found it so, the statement is completely unenlightening with respect to what standard the court utilized in making that determination. Indeed, if the district court, even in the total absence of any affirmative evidence to the effect actually used a reasonable doubt standard, his finding of voluntariness would be erroneous as a matter of law. As stressed in appellant's opening brief, the only evidence of guilt offered by the Government in 1946 was a confession extracted during a five-day period of unlawful detention during which appellant was admittedly never informed of his absolute right to remain silent or of his right to procure counsel. In the inherently coercive circumstances in which appellant's confession was extracted, it would seem impossible for reasonable men to find the confession voluntary beyond a reasonable doubt.

Finally, the Government contends (Brief, pp. 17-18) that the standards of proof applied by the trial court in resolving the voluntariness issue are not subject to collateral

attack. This argument is absurd on its face. If the basic procedures utilized in determining the voluntariness of a confession are subject to collateral attack, as the Government concedes, it is difficult to understand how these procedures can be adequately explored in complete disregard of the standards of proof utilized. Indeed, in a case like the present one where the only evidence of guilt is the confession the standard of proof is the most vital aspect of the method used for "reliable" ascertainment of voluntariness.

III. THE JURY WAS NEVER INSTRUCTED THAT BEFORE IT COULD FIND APPELLANT GUILTY IT MUST BE SATISFIED BEYOND A REASONABLE DOUBT THAT HIS CONFESSION WAS VOLUNTARY.

A. The Government does not challenge appellant's contention that the district court erroneously failed to instruct the jury that before it could return a verdict of guilty it must be satisfied that the confession was voluntary beyond a reasonable doubt. Instead, the Government relies on the general proposition (Brief, p. 18) that jury instructions are not subject to collateral attack. As in the case of the standard of proof utilized by the trial court in its preliminary determination, however, it seems clear that the reliability of the basic procedures for determining the voluntariness of a confession must include analysis of the

charge to the jury. As stated in the Inman case (352 F.2d, supra, at 956), "the court should instruct the jury, whether requested or not, upon the law governing the use of a confession" and these instructions should include "a forthright caution that before giving any weight to the confession the jury must be satisfied beyond a reasonble doubt that it [was voluntary]" (emphasis added). No such instruction was given in the present case. Instead, the jury was told, in effect, to bring in a verdict of "guilty" if it believed the testimony of the police officers, who, the jury was carefully informed, were sworn to uphold the law, and if it disbelieved the appellant, who, the jury was informed with equal care, was a convicted felon.

B. Contrary to any implications in the Government's brief (see pp. 16-17), the Supreme Court in Jackson did not disapprove the previous practice in New York, and elsewhere, of submitting the issue of voluntariness to the jury on the basis of a reasonable doubt standard. Indeed, as the Government admits (Brief, p. 17), there was no issue before the Court in Jackson concerning the well-established practice in New York of putting the burden upon the state to prove voluntariness beyond a reasonable doubt and of submitting the voluntariness issue under a reasonable doubt instruction.[2/]

2/ In Stein v. New York, 346 U.S. 156 (1953), it was made clear that the traditional practice under the old New York procedure was to submit the confession to the jury with the instruction that the jury "must find beyond a reasonable doubt that these confessions, or either of them, was a voluntary one before you would have a right to consider either of them" (id., at 173, n.17).

It is true, as the Government points out (Brief, p. 17), that one of the bases of Mr. Justice Black's dissent in Jackson was the failure of the majority "to say anything about the burden of proving voluntariness" (378 U.S. at 405). But it seems perfectly clear that the Court did not disturb that aspect of the traditional New York procedure which had long required voluntariness to be proved by the state beyond a reasonable doubt and for the court to instruct the jury accordingly. See Stein v. New York, supra; People v. Valletutti, 297 N.Y. 226, 78 N.E.2d 485 (1948). Many jurisdictions following the so-called orthodox rule also have long required the judge to find the confession voluntary beyond a reasonable doubt, and, if he does so, to submit it to the jury on that basis. See, e.g., Commonwealth of Kentucky v. Mayhew, 297 Ky. 172, 178 S.W.2d 928 (1943). Moreover, even in jurisdictions which followed the New York procedure prior to Jackson, the courts have continued to place the burden on the prosecution of establishing voluntariness beyond a reasonable doubt. See, e.g., People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965). Mr. Justice Black's fears appear unfounded and, if anything, the opinion of the majority in Jackson has led to more widespread and uniform use of the reasonable doubt standard at both stages of the determination of voluntariness. E.g., Inman v. United States, supra.

But in the present case, the trial court based its charge to the jury almost exclusively on the credibility of witnesses and did not caution that before a verdict of guilty could be returned the jury must find appellant's confession voluntary beyond a reasonable doubt. This was clearly erroneous. It is submitted that the opinion in the Inman case, supra, enunciates proper federal standards, applicable to this case, and that the procedures there spelled out should be adopted in this jurisdiction.

IV. THE TECHNICAL PROCEDURAL ARGUMENTS OF THE GOVERNMENT MUST BE REJECTED.

The Government argues that as a general rule questions under McNabb v. United States, 318 U.S. 332 (1943), are not cognizable on collateral attack. But see Hodges v. United States, 108 U.S.App.D.C. 375, 282 F.2d 858 (1960), cert. dismissed 368 U.S. 139 (1961). On the other hand, the question whether the voluntariness of a confession has been reliably determined clearly can be raised in a collateral proceeding. Since the latter question, particularly as it embraces standards of proof as in the present case, is so closely related to issues concerning appellant's unlawful detention and the admitted failure of his police interrogators to inform him of his constitutional rights, it seems impossible adequately to review the Jackson point without consideration of McNabb and Escobedo (Escobedo v.

Illinois, 378 U.S. 478 (1964)), even if the latter points would not afford independent grounds for collateral relief, a proposition which in the aggravated circumstances of this case is by no means clear.[8/]

As for the alleged failure to raise the McNabb and Escobedo points in the pro se petition below, the Government stresses (Brief, pp. 3, 13) that the coram nobis court carefully reviewed and interpreted his trial notes, consisting of some three or four pages of handwritten entries, and was fully aware of the law in this area. But it is impossible to "review" and "interpret" those notes without having the facts showing unlawful detention and the admitted failure to warn appellant of his constitutional rights literally leap to the eye. The court below should have taken notice of these facts on its own motion and its failure to do so was clearly erroneous. See Carroll v. Boles, 347 F.2d 96 (4th Cir. 1965); Jackson v. United States, _____U.S.App.D.C._____, 353 F.2d 862 (1965).

8/ As pointed out in appellant's opening brief (p. 20, n. 11), this Court has specifically recognized the interlacing characteristics of these rules, all of which are designed to guard against the use of possibly involuntary confessions.

Conclusion

For the reasons stated in the opening brief and in this reply, it is submitted that the district court did not reliably determine the voluntariness of appellant's confession. Since that confession was obtained in inherently coercive circumstances, it would seem impossible for reasonable men to find the confession voluntary beyond a reasonable doubt. Accordingly, it is submitted that the appropriate remedy in this case would be to remand to the district court with instructions to vacate and set aside appellant's unlawful 1946 conviction.

Respectfully submitted

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April 28, 1966

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,757

NATHANIEL CLIFTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JAMES A. STRAZZELLA,
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Cr. No. 76574 [1946]
(Coram nobis)

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1. Did the trial judge follow the approved "Massachusetts procedure" in determining the voluntariness of appellant's confession when he: excluded the jury, heard testimony (including testimony from appellant), ruled that the confession was voluntary, and subsequently submitted the issue to the jury for reconsideration after the evidence on coerciveness was presented to them?

2. May appellant raise in this Court the *McNabb-Mallory* contention that his confession should have been excluded because of illegal detention when he did not raise that issue in his petition below? In any event, is a claim of illegal detention cognizable on collateral attack?

3. Putting aside other questions involved in the issue, may appellant interject in this Court the *Escobedo* argument that his confession should have been excluded because it was obtained without advising him of his right to counsel when he did not raise that question in the court below?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,757

NATHANIEL CLIFTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In 1946 appellant was indicted for robbery in Criminal No. 76574. On April 5, 1946, a jury returned a verdict of guilty against appellant, represented by counsel, and a co-defendant, a third defendant having been granted a directed verdict of acquittal. On April 18, 1946, a sentence of 2 to 6 years imprisonment was imposed. That sentence has been served.[1]

The evidence against appellant at the 1946 trial consisted, in main part, of appellant's confession. Before admitting the confession into evidence, the trial judge excluded the jury and heard evidence concerning the volun-

[1] The problems of compiling a record on this appeal in view of the lack of a transcript are set out in appellant's brief, pp. 2-4.

tariness of the confession, including testimony from appellant (Trial Notes 42-43). The trial judge found that the confession was voluntary (239 F. Supp. 49, 51) and admitted it into evidence (Trial Notes 43). The jury was then brought back and evidence on voluntariness was again presented, with both Government witnesses and appellant testifying (Trial Notes 43-45). At the close of the evidence the trial judge submitted the issue of voluntariness to the jury, directing them that they must reject and disregard the confession if they found that it was obtained by duress, coercion, force, or as a result of inducement. If they found the confession involuntary, they were directed to find a verdict of not guilty. (Instructions Tr. 6-7). The trial judge repeatedly informed the jury that questions of fact were for them and that they were not bound by any of his comments on the facts (Instructions Tr. 1, 7, 8). In response to a question from the court, defense counsel stated that he had no requests or objections to the charge as given (Instructions Tr. 9).

The jury retired and the judge's trial notes reveal that three and a half hours later an "*Allen*" charge was given (Trial Notes 46),[2] although the record nowhere reveals the form of the charge.[3] Approximately one hour later the jury returned a verdict of guilty. No appeal was taken.[4]

In 1964, upon conviction of grand larceny, appellant was sentenced to 10 to 15 years as a multiple offender in New York (see papers in D.C. Civil Action No. 2316-64).

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[2] See *Allen* v. *United States*, 164 U.S. 492 (1896).

[3] Compare Brief for Appellant, pp. 11, 34.
The "*Allen*" charge was raised as an issue in a prior petition, which petition was dismissed. Civil Action No. 2316-64.

[4] Appellant's brief states off-the-record information that trial counsel did not inform appellant of his right to appeal and states that it does not appear that appellant was otherwise aware of his right to appeal. While much might be said in this regard (including the fact that appellant was not a newcomer to the judicial process), it is pertinent to note, at least, that in a prior petition for *coram nobis* appellant alleged that counsel explicitly promised to take an appeal and did not do so. The allegation was denied by trial counsel; the petition was dismissed. Civil Action No. 2316-64.

On September 21, 1964 appellant filed in the District Court a petition attacking the conviction involved in this case. *Clifton* v. *United States*, Civil Action No. 2316-64. The petition alleged numerous errors in appellant's conviction and was treated by the Government as a motion for a writ in the nature of *coram nobis*. The District Court dismissed the petition with memorandum after reviewing its trial notes. This Court denied appellant's petition to appeal without prepayment of costs. Misc. No. 2512.

On February 17, 1965 appellant filed a second *pro se* motion for a writ in the nature of *coram nobis*. This petition alleged a single, specific ground—that the trial court had not afforded appellant an independent hearing to determine the voluntariness of his confession as required by *Jackson* v. *Denno*, 378 U.S. 368 (1964). Only the transcript of the jury instructions was available, but the petition judge was the same judge who had tried the case and he turned to his personal notes of the trial. Reviewing those notes and interpreting them, the court below found that at trial the judge himself had, in fact, decided that the confession was voluntary after an independent hearing. In the alternative, the court below concluded that *Jackson* v. *Denno* was not to be applied retroactively in the federal courts. It dismissed the petition without hearing and filed a written memorandum. *United States* v. *Clifton*, 239 F. Supp. 49 (1965).

Appellant again sought allowance of appeal to this Court without prepayment of costs. This petition was allowed, Judge Leventhal dissenting with memorandum (Misc. No. 2577) and counsel was appointed for appeal.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part:

> [N]or shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

SUMMARY OF ARGUMENT

Appellee assumes both the availability of *coram nobis* in cases of the present sort and the retroactivity of the holding in *Jackson* v. *Denno* that the New York method used in determining voluntariness in that case did not afford the defendant the required independent, pre-jury determination of voluntariness. However, the court below has found that the procedure used at the trial of this case was *not* the now-condemned New York procedure; it has found that at trial the judge himself reached an independent determination of voluntariness and followed the so-called Massachusetts procedure of determining voluntariness. The Supreme Court made it clear in *Jackson* that it meant to raise no questions concerning this Massachusetts procedure and the court below was therefore correct in its alternative holding rejecting appellant's specific contention that the court did not afford him an independent hearing at trial.

Other contentions raised by appellant in his brief were neither raised in the court below nor passed upon. Consequently, they may not be raised here.

ARGUMENT

I. The trial judge independently determined the voluntariness of the confession in a manner not invalidated by *Jackson* v. *Denno*.

(Trial Notes 42-46.) (Instructions Tr. 1-9.)

Appellant collaterally attacks his 1946 conviction in Criminal No. 76574 for robbery in this jurisdiction. Since appellant has long ago served the sentence under the conviction which he attacks, the attack would ordinarily be moot.[5] The claim is seemingly saved, however, by the fact that appellant's 1946 conviction was relied upon in New York which sentenced appellant as a multiple offend-

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[5] See, *e.g.*, *Parker* v. *Ellis*, 362 U.S. 574 (1960). See also *Jones* v. *Cunningham*, 371 U.S. 236 (1963).

er[6] under a state statute,[7] and appellant is presently serving that New York sentence.[8] While this connection apparently prevents the attack on the conviction from being moot, it is questionable whether any practical effect would actually occur even if the present attack proved successful. Appellant has numerous other convictions which would constitute prior felony convictions for purposes of resentencing appellant as a third offender in New York should he be successful on this appeal.[9]

The court below assumed, without deciding, that the relief appellant sought was available, if merited, under the requested writ in the nature of *coram nobis*.[10] Similarly, appellee assumes for purposes of this appeal that a petition for a writ in the nature of *coram nobis* would be the proper remedy in this case. *Cf. People* v. *Huntley*,

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[6] The court below was under the impression that appellant was a second offender (see 239 F. Supp. at 49-50) but New York records agree with appellant's brief (p. 2 n.1) that he was sentenced as a third offender.

[7] 39 McKinney's Consol. N.Y. Laws Ann. § 1941 (Supp. 1965).

[8] See *Morgan* v. *United States*, 346 U.S. 502 (1954) (not moot); *cf. Pollard* v. *United States*, 352 U.S. 354, 358 (1957).

[9] His record in this jurisdiction alone includes at least two (so-far) unattacked robbery convictions (in addition to the one attacked here) and a grand larceny conviction: Criminal No. 76105 (plea of guilty to grand larceny, January 1946), Criminal No. 76575 (plea of guilty to robbery, May 1946), and Criminal No. 1146-54 (robbery, 1956).

New York law provides for re-sentencing at any time after discovery of additional felonies. 39 McKinney's Consol. N.Y. Laws § 1943 (Supp. 1965).

[10] 239 F. Supp. at 50.

Because appellant is not presently detained under the sentence he contests, the normal vehicle for collateral attack, 28 U.S.C. § 2255 (1964), is not available. *E.g., Heflin* v. *United States*, 358 U.S. 415 (1959); *Daniel* v. *United States*, 107 U.S. App. D.C. 110, 274 F.2d 768 (1960), *cert. denied*, 366 U.S. 970 (1961). However, the absence of present detention under the sentence attacked is not a bar to the invocation of a petition for a writ in nature of *coram nobis* when the sentence is affecting a present sentence. See *Morgan* v. *United States*, 346 U.S. 502 (1954).

15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965) (state *coram nobis;* may raise *Jackson*).[11] With the considerations set out in note 11 in mind, and believing that on the merits appellant is entitled to no relief, appellee also assumes for purposes of this brief that the breadth of relief available by way of appellant's motion in the nature

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[11] The assumption is not untroublesome. At common law the writ of *coram nobis* had an extremely narrow function. The writ lay to assert some previously unknown *fact* going to the right of the court to proceed and affecting the power of the court to attain a valid result in the proceedings. It did not lie to litigate matters of fact put in issue and passed upon at trial. Nor did it lie unless the unknown fact would probably have caused the trial court to act differently had the fact been known to the court at the time of trial. The writ was not available where (as in the instant case) the facts relied upon were disclosed on the face of the record or where (as here) the error alleged was one of *law.* See generally, *Morgan* v. *United States,* 346 U.S. 502 (1954); *United States* v. *Mayer,* 235 U.S. 55, 67-69 (1914); *Moon* v. *United States,* 106 U.S. App. D.C. 301, 272 F.2d 530 (1959); *(Raymond) Thomas* v. *United States,* 106 U.S. App. D.C. 234, 271 F.2d 500 (1959); *Bateman* v. *United States,* 277 F.2d 65 (8th Cir. 1960); *Dunn* v. *United States,* 238 F.2d 908 (6th Cir. 1956); *State* v. *Campbell,* 307 S.W.2d 486, 489 (Mo. 1957); *Commonwealth ex rel. Stevens* v. *Myers,* 419 Pa. 1, n.15, 213 A.2d 613, 619 n.15 (1965). The leading case of *Morgan* v. *United States, supra,* is not inconsistent with this traditional view since the Court pointed out, in just that regard, that the record was barren of the alleged facts upon which the claim turned. 346 U.S. at 511-12.

Nevertheless, the Supreme Court termed the writ which it reviewed in *Morgan* not a writ of *coram nobis,* but a writ *in the nature of coram nobis* and indicated some difference. See 346 U.S. at 505, 506, 508, 509. See also the dissenting opinion, 346 U.S. at 518. Moreover, the Court showed its concern for the principle that "federal courts should act in doing justice if the record makes plain a right of relief". (Footnote omitted.) 346 U.S. at 505. See also 346 U.S. at 512 ("Otherwise a wrong may stand uncorrected which the available remedy would right."); *Bell* v. *Hood,* 327 U.S. 678, 684 (1946) ("where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief".) Most importantly, the "all-writs section" (28 U.S.C. § 1651(a))—heavily relied upon in *Morgan*—allows substantial leeway to expand and modify federal writs.

Throughout the remainder of this brief reference to "*coram nobis*" is intended to mean reference to a writ in the nature of *coram nobis.*

of a *coram nobis* petition is co-extensive with that available through a collateral attack under § 2255. This Court has previously proceeded on that premise in a case in which it eventually held the substantive claims not cognizable on collateral attack. *Jones* v. *United States*, 103 U.S. App. D.C. 326, 258 F.2d 420, *cert. denied*, 358 U.S. 859 (1958).[12] See also *Farnsworth* v. *United States*, 98 U.S. App. D.C. 59, 232 F.2d 59 (1956).[13]

The sole contention raised in the present *coram nobis* petition, and the sole contention dealt with in the memorandum opinion of the District Court, was appellant's contention that the trial judge failed to afford an independent evidentiary hearing, as required by *Jackson* v. *Denno*, 378 U.S. 368 (1964), to determine the contested question of the voluntariness of appellant's confession before the court submitted the question to the jury.

The contention raises two questions: (1) Is the decision in *Jackson* to be applied retroactively?;[14] and (2) Was the procedure employed by the trial judge in the trial of this particular case at variance with the holding of *Jackson?*

The court below dismissed the petition, answering the first question in the negative.[15] Nevertheless, it went on to

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[12] "We assume, without deciding, that the right to a hearing on a petition for *coram nobis* is the same as the right on the motion under Section 2255." (Footnote omitted.) 103 U.S. App. D.C. at 327-28, 258 F.2d at 421-22.

[13] "[T]he reasoning of the Morgan decision seems to impart to *coram nobis* many of the characteristics of habeas corpus . . . ." 98 U.S. App. D.C. at 63 n.5, 232 F.2d at 63 n.5.

[14] The considerations bearing on this question in this case simultaneously answer the inextricably interwoven question of whether this claim of an unconstitutional procedure in determining the voluntariness of the confession is raisable on collateral attack. See note 23, *infra*. The allegation goes to the basic integrity and reliability of the trial. See *Howell* v. *United States*, 172 F.2d 213, 215 (4th Cir.), *cert. denied*, 337 U.S. 906 (1949).

[15] 239 F. Supp. at 50. *Accord*, *United States ex rel. Conboy* v. *Pate*, 240 F. Supp. 237, 241 (N.D. Ill. 1965). *Contra*, *Commonwealth ex rel. Butler* v. *Rundle*, 416 Pa. 321, 206 A.2d 283 (1965); *People* v. *Huntley*, 15 N.Y. 2d 72, 204 N.E. 2d 179, 255 N.Y.S. 2d 838 (1965);

place its decision on the express and narrower alternative ground that, even assuming the retroactivity of *Jackson*, the procedure in the trial attacked here comported with procedures approved in *Jackson*. Approaching the questions in the same order, appellee turns first to the retroactivity question.

A. *Retrospective Application of the Jackson Holding*

Appellee assumes that the holding of *Jackson* applies to convictions, like the present one, which became final before the 1964 decision in *Jackson*. Two primary considerations, *i.e.*, authoritive indications from the Supreme Court and the nature of the infirmity at issue in *Jackson*, suggest the conclusion that the holding is to be applied retrospectively.

Authoritive Indicia. It has been said that "the most persuasive authority for the proposition that the principle of *Jackson* v. *Denno* is to be applied to convictions finalized prior to the date of that decision is *Jackson* itself." *Commonwealth ex rel. Butler* v. *Rundle*, 416 Pa. 321, 326, 206 A.2d 283, 286 (1965) (Roberts, J.). In *Butler*, Justice Roberts pointed out that the entire thrust of the history of *Jackson* showed that the New York method of deciding issues of voluntariness was held to be constitutionally insufficient in a case where the conviction had already become final.[16] *Jackson* itself was a collateral

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United States ex rel. Petersen v. *McMann*, 234 F. Supp. 287 (N.D. N.Y. 1964); *Rudolph* v. *Holman*, 236 F. Supp. 62 (N.D. Ala. 1964). See also *Minnesota ex rel. Holscher* v. *Tahash*, 346 F.2d 556 (8th Cir. 1965) (leaving question open); *Trotter* v. *Stephens*, 241 F. Supp. 33, 45-46 (E.D. Ark. 1965) (noting, but not deciding, problem); *Lokos* v. *State*, 179 So.2d 714, 723 (Ala. 1965) (*Jackson* "generally said to be retroactive").

[16] Although none of the various opinions filed in the numerous proceedings in the case give the exact date of the conviction, Jackson must have been convicted in late 1960 or early 1961. The New York Court of Appeals affirmed his conviction. 10 N.Y.2d 780, 177 N.E. 2d 59, 219 N.Y.S. 2d 621 (1961), amended, 10 N.Y. 2d 816, 178 N.E. 2d 234, 221 N.Y.S. 2d 521 (1961). The Supreme Court of the United States denied certiorari. 368 U.S. 949, 82 S. Ct. 390 (1961). Thereafter, Jackson filed a petition

proceeding. And in dissent in *Jackson*, Mr. Justice Harlan pointed out that the Court was apparently assuming the retroactivity of its holding in the case. 378 U.S. at 349.

Furthermore, at the time *Jackson* was filed the Supreme Court simultaneously remanded several cases to various courts for further proceedings not inconsistent with its opinion in *Jackson*. While most of these cases involved direct appeals,[17] one of these cases was, like *Jackson*, a collateral attack.[18] Likewise, subsequent to the *Jackson* decision, in *Boles* v. *Stevenson*, 379 U.S. 43 (1964), the Court modified an order in regard to a 1960 state conviction so as to render the order in conformity with the decision in *Jackson*.

Finally, in *Linkletter* v. *Walker*, 381 U.S. 618, 628-29 n. 13 (1965), the Supreme Court listed *Jackson* as a decision which had been accorded retrospective application.

The Nature of the Infirmity. One of the critical deficiencies seen in the New York procedure was that, since the sole body determining the voluntariness of a confession was the same as that deciding the issue of guilt or innocence, it was possible that the jury to some extent relied on an involuntary confession. 378 U.S. at 382-83, 386-89.[19] Such reliance, of course, would render the trial

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for habeas corpus. 206 F. Supp. 759 (S.D.N.Y.), aff'd, 309 F.2d 573 (2d. Cir. 1962). It was to review these habeas corpus proceedings that the Supreme Court granted certiorari, 371 U.S. 967, 83 S. Ct. 553 (1963), and made its decision in 1964.

416 Pa. at 326-27, 206 A.2d at 286.

[17] *Catanzaro* v. *New York*, 378 U.S. 573 (1964); *Del Hoyo* v. *New York*, 378 U.S. 570 (1964); *Harris* v. *Texas*, 378 U.S. 572 (1964); *Lathan* v. *New York*, 378 U.S. 566 (1964); *Lopez* v. *Texas*, 378 U.S. 567 (1964); *Muschette* v. *United States*, 378 U.S. 569 (1964); *Oister* v. *Pennsylvania*, 378 U.S. 568 (1964); *Owen* v. *Arizona*, 378 U.S. 574 (1964); *Pea* v. *United States*, 378 U.S. 571 (1964); *Senk* v. *Pennsylvania*, 378 U.S. 562 (1964).

[18] *McNerlin* v. *Denno*, 378 U.S. 575 (1964), *remanding United States ex rel. McNerlin* v. *Denno*, 324 F.2d 46 (2d Cir. 1963) (*habeas corpus* involving 1961 state conviction finalized in 1962).

[19] See *Hutcherson* v. *United States*, ——U.S. App. D.C. ——, 351 F.2d 748, 751-52 (1965).

basically unfair[20] and the Court devised a method for ascertaining, in the case of already final convictions, whether the jury in fact had before it an involuntary confession.[21] The impact of this conclusion by the Supreme Court is that if an involuntary confession was introduced the reliability of the trial as a fact-finding process is seriously impuned. The now invalidated no-pre-jury-determination procedure, if employed, undermined the entire trial and this aspersion appears to bring the *Jackson* holding within the ambit of the retroactivity test articulated in *Linkletter* v. *Walker*, 381 U.S. 618 (1965).[22] Compare *Commonwealth ex rel. Butler* v. *Rundle*, *supra*, 416 Pa. at 329-30 & n. 13, 206 A.2d at 287-88 & n. 13.[23]

For these reasons, appellee assumes the retroactivity of the holding in *Jackson*. But this is only the starting point and does not settle the instant case. The important question is whether the procedure used at trial in the instant case is at odds with *Jackson*.[24]

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[20] See, *e.g.*, *Rogers* v. *Richmond*, 365 U.S. 534 (1961); *Brown* v. *Allen*, 344 U.S. 443, 475 (1953).

[21] 378 U.S. at 394-95.

[22] See also *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406 (1966).

[23] In this case, these same factors, of course, make the claim of failure to hold an independent hearing cognizable by way of collateral attack. See *Boles* v. *Stevenson*, *supra* p. 9; *Jackson* v. *Denno*, *supra*; *McNerlin* v. *Denno*, *supra* note 18; *cf. Commonwealth ex rel. Isenberg* v. *Maroney*, 419 Pa. 430, 433, 206 A.2d 379, 380 (1965) (state *habeas corpus*).

The contention collaterally attacking the procedure used at trial in determining the voluntariness of the confession is to be distinguished from the question of whether the voluntariness of the confession can *itself* be litigated on collateral attack. As to the latter question, see note 39, *infra*.

[24] Nor does the conclusion that the invalidation of the New York method is to be applied retroactively necessarily mean that any given so-called "variation" of the method—such as the one often seemingly used in this jurisdiction (see 378 U.S. at 400)—was so hazardous to the rights of the defendant that *it* vitiated the entire fairness of the trial. In *Jackson* the Supreme Court had before it a

B. *Applicability of Jackson to Instant Case*

In *Jackson* v. *Denno*, the Supreme Court referred to three general methods of dealing with contested questions of voluntariness. In the *Orthodox method* the question of admissibility is submitted solely to the trial judge who decides all questions and conclusively rules on voluntariness; the jury never passes on admissibility.[25] It is clear that this method was not employed at trial in this case.

Under the so-called *Massachusetts procedure*, the judge, out of the presence of the jury, holds a full evidentiary hearing and independently passes upon the issue of voluntariness. If the judge concludes that, in his view, the confession is voluntary, the confession is submitted to the jury for reconsideration of the voluntariness issue.[26] The Supreme Court made clear that it did not disapprove the Massachusetts procedure which, in the Court's view, adequately protected the accused.[27] If the trial judge used this procedure in the trial of the instant case, the trial is not affected by the holding in *Jackson*.

On the other hand, if the trial court followed the *New York procedure* the trial may have been unfair and under *Jackson* a separate hearing on the voluntariness of the 20 year old confession would be required, a new trial (were one possible) to abide the outcome.[28] Under the

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particular method (see 378 U.S. at 377), not all potential, substantially different variants where the judge arrived at some independent, substantive conclusion as regards voluntariness.

Since, as discussed in text, the trial court in this case followed an approved practice and did not follow the New York procedure or any "variant" of that procedure, the retroactive effect of *Jackson* on variants need not be discussed here.

[25] *Jackson* v. *Denno*, 378 U.S. at 378.

[26] *Ibid.*

[27] 378 U.S. at 378 n. 8.

[28] 378 U.S. at 394-95; *Green* v. *United States*, —— U.S. App. D.C. ——, 351 F.2d 198, 201 (*en banc* 1965).

It has not been determined whether a review of a trial transcript might suffice if no other hearing could be held because of the lapse of time. The constitutionality of such a substitute proceeding might

New York procedure declared invalid in *Jackson*, upon objection to the voluntariness of a confession the trial judge, in the presence of the jury,[29] heard the evidence on voluntariness and excluded the confession only if it was involuntary beyond dispute.[30] Where contrary determinations might be drawn from the evidence thus heard the judge was forced to leave the determination to the jury.[31] The judge did not make an independent determination of voluntariness.[32]

This New York method was not employed in the instant case. At this trial, when it appeared that a confession was to be introduced the trial judge excluded the jury (Trial Notes 42).[33] Out of the presence of the jury he heard testimony from appellant[34] and from the detective who received the confession (Trial Notes 42). The objection to the confession was overruled (Trial Notes 42). The jury was then brought back into the courtroom, heard the evidence concerning voluntariness, (Trial Notes 43) and eventually received the issue of voluntariness for reconsideration under instructions from the trial judge (Instructions Tr. 5-8)—instructions to which appellant's trial counsel expressly disclaimed any objection (Instructions Tr. 9).

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perhaps depend in some part on considerations involving whether the trial judge is still sitting and available to review the trial and whether "trial notes" could substitute for a transcript. Compare *Commonwealth* v. *Senk*, 212 A.2d (Advance Sheet) 222 (Pa. 1965) (opinion withdrawn for re-argument on other issue), where the trial judge, after remand from the Supreme Court (see note 17, *supra*) and with the consent of the parties, made his determination on the basis of the trial transcript.

[29] *Jackson* v. *Denno*, 378 U.S. at 377 n. 7.

[30] *Id.* at 377.

[31] *Ibid.*

[32] *Ibid.*

[33] This exclusion was not employed in the New York procedure (378 U.S. at 377 n.7) but is employed under the Massachusetts rule.

[34] Thus obviating one of the deficiencies found in the New York procedure. 378 U.S. at 389 n. 16.

It is thus clear that an independent and full hearing was held by the trial judge before the confession was submitted to the jury for reconsideration. The only question remaining before it may definitively be said that the Massachusetts procedure was employed in this case is whether (1) the trial judge, in spite of the fact that he used all the other above-mentioned phases of the Massachusetts rule, merely concluded that the question was not unquestionably involuntary or that there was a question of fact (as was done under the New York method) and let it go to the jury *or* whether (2) the trial judge himself actually and independently concluded that the confession was voluntary. As to this, no speculation is needed. Fully corroborated by other accouterments of the Massachusetts procedure shown on the record, the trial judge has interpreted exactly what he did at trial in this particular case. *Cf. Smith* v. *Texas*, 236 F. Supp. 857 (S.D. Tex. 1965) (state trial judge testified at *habeas corpus* hearing as to what he did at trial).

On the *coram nobis* review, the court below has made this express finding:

> *"The* [*trial*] *court found on the basis of the evidence that the confession was voluntary*, overruled the objection, and admitted the confession." (Emphasis supplied.)

239 F. Supp. at 51. This express finding means that in the trial of this particular case the Massachuetts rule was employed in all respects.[35]

Unquestionably familiar with the *Jackson* case and the Massachusetts procedure (see 239 F. Supp. at 50), the court below has further stated:

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[35] *Cf. Butler and Greenwell* v. *United States*, —— U.S. App. D.C. ——, 350 F.2d 788 (1965) (trial judge's statement after *Jackson* that confession "admissible" "as matter of law" indicated independent determination). Compare *Green* v. *United States*, —— U.S. App. D.C. ——, 351 F.2d 198, 201 (*en banc* 1965) (trial judge did not follow Massachusetts rule); *Hutcherson* v. *United States*, —— U.S. App. D.C. ——, 351 F.2d 748, 751-52 (1965) (same); *Curtis* v. *United States*, —— U.S. App. D.C. ——, 349 F.2d 718 (1965) (same); *Luck* v. *United States*, —— U.S. App. D.C. ——, 348 F.2d 763 (1965) (same).

> *The Court thus applied what has been called by the Supreme Court in the Jackson case the Massachusetts rule, and did not follow the so-called New York practice,* which was disapproved by the Supreme Court. It may be observed that the procedure followed by this Court in this instance is that traditionally and generally adopted by Federal judges in this District. (Emphasis supplied.)

239 F. Supp. at 51. *Cf. Butler and Greenwell* v. *United States*, —— U.S. App. D.C. ——, 350 F.2d 788, 789 n.1 (1965). Appellant argues that the observation by the court below that the procedure used in this instance was that "traditionally" and "generally adopted" by the District Judges must mean that the trial judge made no independent finding on voluntariness.[36] Appellant contends that the "traditional" practice clearly was that no independent finding of voluntariness was made. It may be conceded that the statement of the court below in this regard is, on its face, not altogether untroublesome *if* one assumes the tradition to be as stated by appellant. Nevertheless, the view of the *court* below as to what was the "traditional" rule in this jurisdiction is not to be auto-

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[36] Brief for Appellant, p. 29, citing *Wright* v. *United States*, 102 U.S. App. D.C. 36, 250 F.2d 2 (1957).

It must be noted also that although appellant flatly states that the "traditional rule" applied in the District of Columbia was specifically condemned by the Supreme Court (Brief for Appellant, p. 29), such is clearly not the case. The Supreme Court, of course, had before it only the New York procedure actually used in Jackson's trial. Furthermore, the Court made it quite plain that it could not tell with certainty what procedure was followed in many circuits, or indeed if a set pattern was followed. 378 U.S. at 378. Thus, each case must stand on its own footing. Most importantly, in Appendix A to its opinion the Supreme Court noted that this Circuit *seemingly* sanctioned a *variation* of the New York procedure. 378 U.S. at 400. It did not class this Circuit with those consistently employing the New York rule. See *ibid.* Indeed, from the Court's description, all the characteristics of the Massachusetts procedure were shown to be employed in this Circuit with the exception that the Court was in crucial doubt as to exactly what the trial judge found before submitting the issue to the jury. 378 U.S. at 400. In this particular case we know what the trial judge found: he independently concluded the confession was voluntary. See text *supra*.

matically equated with *appellant's* understanding of the traditional practice. Indeed, the Supreme Court itself was unable to discern from the same case which appellant believes clearly states the traditional function of the trial judge[37] exactly what "traditional" determination the trial judge usually made in this Circuit. 378 U.S. at 400. Another interpretation might be that the court below was offering its belief that, although it has previously been thought the district judges were not determining voluntariness independently, the majority of judges did follow such a practice, just as the court below did in the instant case. In any event, in such circumstances and amidst such ambiguity, appellee submits that the express finding by the court below that the trial judge in this case "*found the confession was voluntary*" is not lightly to be put aside in favor of an unclear generalization in regard to what other judges did in other cases.

From the trial judge's ruling, his finding on voluntariness was (and is) determinable, for he allowed the confession to go to the jury. Moreover, his findings on disputed issues of fact are ascertainable on the same basis. Both of these results are in harmony with *Jackson*.[38] But the most important fact is that an independent appraisal of voluntariness was made.[39]

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[37] *Wright* v. *United States*, *supra* note 36.

[38] 378 U.S. at 378:

> "[Under the Massachusetts rule] the judge's conclusions are clearly evident from the record since he either admits the confession into evidence if it is voluntary or rejects it if involuntary. Moreover, his finding upon disputed issues of fact are expressly stated or may be ascertainable from the record".

[39] It is appropriate to note that the lack of express findings on voluntariness is of practically no consequence here, unlike the situations in *Green* v. *United States*, —— U.S. App. D.C. ——, 351 F.2d 198 (*en banc* 1965); *Butler and Greenwell* v. *United States*, —— U.S. App. D.C. ——, 350 F.2d 788 (1965); *Luck* v. *United States*, —— U.S. App. D.C. ——, 348 F.2d 763 (1965); *Curtis* v. *United States*, —— U.S. App. D.C. ——, 349 F.2d 718 (1965); and *Hutcherson* v. *United States*, —— U.S. App. D.C. ——, 351 F.2d 748 (1965), or, indeed, like that in *Jackson* v. *Denno* itself. In

C. *Standards of Proof*

Appellant's concluding assertions are that the trial judge did not apply the correct standard of proof in determining the voluntariness of the confession and did not specifically charge the jury that they must find voluntariness beyond a reasonable doubt. Appellee assumes *arguendo*, without conceding, appellant's contention that the standard at both stages of the voluntariness determination might be proof beyond a reasonable doubt.[40] In *Jack-*

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those cases the express findings were important so that appellate review of the question of voluntariness itself might be had. The above cited cases in this Court were direct appeals where that substantantive re-examination was important. But review of the once federally litigated and decided substantive question of voluntariness in this case is not *per se* reviewable on collateral attack. *Compare Lampe* v. *United States*, 110 U.S. App. D.C. 69, 288 F.2d 881 (*en banc* 1961) (litigated at trial; not raisable in collateral proceeding), *cert. denied*, 368 U.S. 958 (1962); Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 379-80 & n.8 (1964), *with (Leland) Thomas* v. *United States*, —— U.S. App. D.C. ——, 352 F.2d 701 (1965) (not known whether issue litigated at trial because no transcript available; raisable on collateral attack). (As to the distinguishable issue of a *state* prisoner's right to have a federal court at some time determine the federal question of the voluntariness of his confession, see *Fay* v. *Noia*, 372 U.S. 391 (1963); *Rogers* v. *Richmond*, 365 U.S. 534 (1961).) In *Jackson* the specific findings had importance because, although a collateral attack, the substantive question of coerciveness was open to federal review of the prior state determination of a federal question. In this case, absent a fatal defect in *procedure*, there will be no review of the finding of voluntariness. If the procedure is defective, the finding itself will be not reviewed, as such, even then; a new determination will be required.

[40] See *Inman* v. *United States*, 352 F.2d 954 (4th Cir. 1965) (direct appeal; no submission of issue to jury; judge and jury should both use reasonable doubt). In another Fourth Circuit case, *Stevenson* v. *Boles*, 331 F.2d 939 (4th Cir. 1964) (habeas corpus), the trial court had held no independent hearing at all nor was the issue of voluntariness put before the jury at all. The Court of Appeals stated that the issue should have been put before the jury and the test was reasonable doubt; it granted a new trial. *Id.* at 942. On appeal, the Supreme Court modified the order by remanding for an evidentiary hearing instead of a new trial. 379 U.S. 43 (1964). It placed its decision on the lack of *any* independent determination of voluntariness and did not deal with the standard of proof. In *Whiteside* v. *United States*, 346 F.2d 500, 506 n.2 (8th Cir. 1965), the Court

son the Supreme Court did not decide the standard to be applied by the hearing judge, as Mr. Justice Black pointed out.[41] And the Court itself disclaimed any ruling on the jury instructions concerning the consideration of voluntariness, which in that case apparently did not tell the jury they had to apply a "beyond a reasonable doubt" test. See 378 U.S. at 375 n.5. Indeed, it has never been thought that in determining questions of evidentiary admissibility, the appropriate test was "beyond a reasonable doubt". Consider, *e.g.*, the ruling on admissibility of evidence in the face of a claim of illegal search and seizure because of lack of probable cause.[42]

But assuming *arguendo* appellant's contention, and even putting aside the fact that nowhere does it appear that the trial judge did *not* apply such a standard, appellant's argument that the trial judge applied a lesser standard is of vastly less constitutional significance than his contention that he was not afforded an independent hearing and determination at all. As such, the conten-

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merely quoted the trial judge's language (requiring that voluntariness be determined on "beyond reasonable doubt" standard), noted there was no objection to the charge, and did not deal with the question. See also *United States ex rel. Walden* v. *Pate*, 350 F.2d 240, 243 (7th Cir. 1965) (jury "properly instructed" that confession was to be found voluntary beyond reasonable doubt).

[41] Another disadvantage to the defendant under the Court's new rule *is the failure to say anything about the burden of proving voluntariness*. The New York rule does now and apparently always has put on the State the burden of convincing the jury beyond a reasonable doubt that the confession is voluntary. . . . The Court has not said that its new constitutional rule, which requires the judge to decide voluntariness, also imposes on the State the burden of proving this fact beyond a reasonable doubt. Does the Court's new rule allow the judge to decide voluntariness merely on a prepondence of the evidence? If so, this is a distinct disadvantage to the defendant. In fashioning its new constitutional rule, the court should not leave this important issue in doubt. (Emphasis supplied.)

378 U.S. at 404-05 (dissenting opinion).

[42] Appellant's analogy to insanity issues (Brief for Appellant, p. 15 n.26) is not persuasive since that issue goes to an element of the crime, an issue differing greatly from the admissibility of evidence.

tion should not be deemed a fit subject for collateral attack because collateral remedies are not available to correct errors committed in the course of a trial, even though such errors relate to constitutional rights, especially where, as here, petitioner was represented by counsel at trial. *Moon* v. *United States*, 106 U.S. App. D.C. 301, 303, 272 F.2d 530, 532 (1959); *Howell* v. *United States*, 172 F.2d 213, 215 (4th Cir.), *cert. denied*, 339 U.S. 906 (1949).

The same may be said of the now-contested instructions to the jury. Contentions contesting jury instructions are not proper grist for collateral proceedings. See *ibid.*; *Adams* v. *United States*, 95 U.S. App. D.C. 354, 222 F.2d 45 (1955); *United States* v. *Sobell*, 314 F.2d 314, 330 (2d Cir.), *cert. denied*, 374 U.S. 857 (1963); *(William) Banks* v. *United States*, 287 F.2d 374 (7th Cir.), *cert. denied*, 366 U.S. 939 (1961); *United States* v. *Stevens*, 260 F.2d 549 (3d Cir. 1958); *(Chester) Banks* v. *United States*, 258 F.2d 318 (9th Cir.), *cert. denied*, 358 U.S. 886 (1958); *Dunn* v. *United States*, 238 F.2d 908 (6th Cir. 1956) *(coram nobis)*, *cert. denied*, 353 U.S. 939 (1957). Moreover, even on direct appeal, failure to object to concededly erroneous reasonable doubt instructions will usually preclude reversal. *E.g.*, *Scurry* v. *United States*, 120 U.S. App. D.C. 374, 347 F.2d 468 (1965); Fed. R. Crim. P. 30. *A fortiori* is this true on collateral attack. Moreover, at trial, defense counsel explicitly told the judge he had no objection to the jury instructions as given (Instructions Tr. 9). See *Kelley* v. *United States*, D.C. Cir. No. 19746, decided March 8, 1965. And, importantly, it is fatal to appellant's claim in this regard that the questions now raised were neither raised in appellant's petition nor passed upon by the *coram nobis* judge. See, *e.g.*, *Lampe* v. *United States*, 110 U.S. App. D.C. 69, 288 F.2d 881 (*en banc* 1961), *cert. denied*, 368 U.S. 958 (1962).[43]

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[43] Two other aspects of appellant's instruction argument merit some further comment.

First, appellant, after silence at trial, seems to express collateral dissatisfaction with the fact that an *"Allen"* charge was given

Appellant's argument on standards of proof should be rejected.

II. The contention of illegal detention was not raised below and cannot be raised now; nor is it cognizable on collateral attack.

Appellant's second contention on this appeal is that his conviction must be collaterally invalidated because his confession was obtained during a period of detention illegal under Fed. R. Crim. P. 5(a).[44] The point was not raised in this petition for *coram nobis*, nor passed upon

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(Trial Notes 46). Brief for Appellant, p. 34. It must be noted that nowhere, either in the judge's trial notes or the transcript of the instructions, does the form of the court's "*Allen*" instruction appear.

Secondly, appellant (also for the first time in this proceeding) attacks the trial judge's suggestion to the jury that the jury might want to consider a particular circumstance in the evidence. Brief for Appellant, p. 32-33. Aside from the fact that trial counsel found the statement unobjectionable in context, it is notable that, although appellant claims the statement was made "with all persuasiveness of judicial utterance", the trial judge in the very next paragraph after those quoted by appellant repeated:

> As I said before—you are the sole and final judges of the questions of fact, and my comments as to them are not binding on you, and I am permitted to make them for the purpose of aiding you; but you are free to attach such weight as you care to, to them—or, no weight whatever; and if your recollection of the testimony differs from mine, then your version, your recollection, must prevail. (Instructions Tr. 8.)

See also Instructions Tr. 1, 7. Moreover, even from the standpoint of direct review, the comment, taken in context (*Roberts* v. *United States*, 109 U.S. App. D.C. 75, 284 F.2d 209 (1960), *cert. denied*, 368 U.S. 863 (1961)), was within permissible bounds in the circumstances. *E.g.*, *Quercia* v. *United States*, 289 U.S. 466, 469 (1933); *Billeci* v. *United States*, 87 U.S. App. D.C. 274, 283, 184 F.2d 394, 403 (1950); *(Arthur) Smith* v. *United States*, 55 App. D.C. 117, 2 F.2d 919 (1924).

[44] No objection at trial to the confession on these grounds is apparent on the record. The case was tried in 1946, after *McNabb* v. *United States*, 318 U.S. 332 (1943), had been decided, but 11 years before *Mallory* v. *United States*, 354 U.S. 449 (1957). See also Brief for Appellant, p. 39 n. 22.

by the court below on this petition.[45] Under such circumstances, the injection of the contenton is untimely; matters not presented below will not be considered on appeal. *E.g., Lampe* v. *United States*, 110 U.S. App. D.C. 69, 69-70, 288 F.2d 881, 881-82 (*en banc* 1961) (§ 2255), *cert. denied*, 368 U.S. 958 (1962); *Plummer* v. *United States*, 104 U.S. App. D.C. 211, 212, 260 F.2d 729, 730 (1958) (§ 2255); *(Warren) Smith* v. *United States*, 287 F.2d 270, 273 (9th Cir.) (§ 2255), *cert. denied*, 336 U.S. 946 (1961); *Bartholomew* v. *United States*, 286 F.2d 779, 782 (8th Cir. 1961) (§ 2255); *Way* v. *United States*, 276 F.2d 912, 913 (10th Cir. 1960) (§ 2255); *Johnson* v. *United States*, 254 F.2d 239, 241 (8th Cir. 1958) (§ 2255); *United States* v. *Sobell*, 314 F.2d 314, 322 n.6 (2d Cir.), *cert. denied*, 374 U.S. 857 (1963).[46]

Furthermore, this claim that evidence was secured from appellant in violation of Fed. R. Crim. P. 5(a) is not cognizable on collateral attack. *E.g., Moon* v. *United States*, 106 U.S. App. 301, 303, 272 F.2d 530, 532 (1959) (§ 2255); *Plummer* v. *United States*, 104 U.S. App. D.C. 211, 212, 260 F.2d 729, 730 (1958) (§ 2255); *(James) Smith* v. *United States*, 88 U.S. App. D.C. 80, 187 F.2d 192 (1950), *cert. denied*, 341 U.S. 927 (1951); see *United States* v. *Sobell*, 314 F.2d 314, 322 (2d Cir), *cert. denied*, 374 U.S. 857 (1963); *cf. White* v. *United States*, 98 U.S. App. D.C. 274, 235 F.2d 221 (1956) *(coram nobis)* (illegal seizure cannot be raised).[47]

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[45] The illegal detention issue was raised in the prior *coram nobis* petition (see Petition, p. VI, Point II) and was apparently passed upon by the court (see Memorandum of November 13, 1964, p. 2). Civil Action No. 2316-64.

[46] The considerations underlying this rule make it immaterial that appellant's petition was filed *pro se*. See, *e.g., Plummer* v. *United States*, 104 U.S. App. D.C. 211, 260 F.2d 729 (1958) (§ 2255) (*pro se* petition).

[47] Note that the claim of illegal detention, like that of search and seizure (*Linkletter* v. *Walker*, 381 U.S. 618 (1965)), does not affect the reliability of the trial.

III. The *Escobedo* contention was not raised below and cannot be raised now.

Since the right to counsel issue was not raised in the court below, all the considerations discussed under Point II of this brief, *supra* pp. 19-20, apply with similar force to appellant's final argument that the conviction must be overturned because his confession was allegedly obtained in violation of rights articulated in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).[48] That discussion is therefore not repeated here.[49]

CONCLUSION

Assuming the availability of *coram nobis* in a case of the present sort and assuming the retroactivity of the holding in *Jackson* v. *Denno*, in this case it appears that the trial judge actually reached an independent determination of the voluntariness of appellant's confession before submitting the same issue to the jury. Under such circumstances, *Jackson* would have no effect. Appellant's other contentions were not raised below and should not be considered here.

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[48] There was no hearing or finding on this allegation, of course, since the contention was not made in the court below.

[49] It is pertinent to note that the "non-request" issue and the issue of the retroactivity of the *Escobedo* decision are questions presently before the Supreme Court. See 34 U.S.L. WEEK 3297 (1966); *Johnson* v. *New Jersey*, 382 U.S. 925 (1965), *granting cert. in* 43 N.J. 572, 206 A.2d 737 (1965); *Miranda* v. *Arizona*, 382 U.S. 925 (1965), *granting cert. in* 98 Ariz. 18, 401 P.2d 721 (1965); *Stewart* v. *California*, 382 U.S. 937 (1965), *granting cert. in* 43 Cal. Rptr. 201, 400 P.2d 97 (1965); *Vignera* v. *New York*, 382 U.S. 925 (1965), *granting cert. in* 15 N.Y.2d 970, 207 N.E.2d 527, 259 N.Y.S. 2d 857 (1965); *Westover* v. *United States*, 382 U.S. 924 (1965), *granting cert. in* 342 F.2d 684 (9th Cir. 1965).

Since the principal issue was not raised below it is unnecessary to discuss appellant's contentions that *Escobedo* should be extended to the "non-request" situation and that the *Escobedo* principle, so extended, should be applied retrospectively. Similarly, no discussion of the related issue of whether the point may be raised collaterally is warranted.

WHEREFORE, appellee respectfully submits that the dismissal of the petition should be affirmed.

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